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Circuit Courts with Plenary Jurisdiction and Administrative Agencies with Exclusive Jurisdiction: Can They Peacefully Coexist in Missouri?

Paul M. Spinden*

I. INTRODUCTION

For Missouri courts, 2009 was the year of jurisdiction. The year began with the Supreme Court of Missouri’s momentous pronouncement that the state’s circuit courts have broad subject matter jurisdiction – jurisdiction that is plenary in scope.¹ Its breadth is so expansive that successful motions to dismiss for lack of subject matter jurisdiction seem to be a relic of the past.² As momentous as that revelation was, another at the end of the year was even more epochal: the circuit courts’ subject matter jurisdiction is so broad that it engulfs even matters that the General Assembly delegates to the exclusive jurisdiction of administrative agencies, such as workers’ compensation.³

The reason for these revelations was a change to the Missouri Constitution – one that occurred more than three decades before. In 1976, Missouri-ans amended their constitution to give circuit courts “original jurisdiction over all cases and matters, civil and criminal.”⁴ The amendment took away the General Assembly’s authority to put statutory restrictions on circuit courts’ subject matter jurisdiction. As significant as the amendment was, surprisingly there is little evidence that anyone took much notice of it before

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1. J.C.W. *ex rel.* Webb v. Wyciskalla, 275 S.W.3d 249, 253-54 (Mo. 2009) (en banc).

2. *Id.* at 254 (“[So long as a] case is a civil case . . . the circuit court has subject matter jurisdiction and, thus, has the authority to hear [the] dispute.”).

3. McCracken v. Wal-Mart Stores E., L.P., 298 S.W.3d 473 (Mo. 2009) (en banc).

4. MO. CONST. art. V, § 14(a). Before the change, the provision granted circuit courts “jurisdiction over all criminal cases not otherwise provided for by law, exclusive original jurisdiction in all civil cases not otherwise provided for, and concurrent and appellate jurisdiction as provided by law.” MO. CONST. art. V, § 14 (amended 1976).

the Supreme Court of Missouri shined the spotlight on it in 2009 in *J.C.W. ex rel. Webb v. Wyciskalla*.⁵ It seems odd that it took thirty-three years for Missouri courts to perceive the significance of the constitution's grant of all-encompassing power to trial courts. This begs two questions: what precipitated the change and what was the change all about?

When the Supreme Court finally took notice of the amendment in *J.C.W.*, the court asserted that the change solved the perplexities of subject matter jurisdiction for Missouri judges.⁶ In fact, the court assured, the constitutional amendment simplified analysis of jurisdictional issues in Missouri by allowing judges to determine their courts' subject matter jurisdiction simply by asking whether a lawsuit is a civil case or matter.⁷ If it is, judges can be certain that their courts have subject matter jurisdiction, and that any issue arising in a case speaking in jurisdictional terms – such as a statute requiring posting of a bond to file a petition – is not jurisdictional.⁸

As simple as *J.C.W.*'s analysis seems to be, it apparently was rather unsettling for Missouri judges. It was a huge change in their analysis of jurisdictional issues, requiring them to jettison longstanding, entrenched concepts and traditions – and traditions tend to be tenacious.⁹ Moreover, judges, like most individuals, intrinsically distrust anything new.¹⁰ Thus Missouri judges struggled to apply *J.C.W.*'s simple approach at the outset, most notably in cases involving administrative agency jurisdiction. In a case questioning the jurisdiction of the Missouri Division of Workers' Compensation, an apparently exasperated appellate judge commented that, after *J.C.W.*, “confusion . . . seems to permeate any use of the word ‘jurisdiction.’”¹¹

5. 275 S.W.3d 249.

6. The complexities of jurisdictional doctrine – easy to define but difficult to apply – have long vexed judges. LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 41 (4th ed. 2009). *J.C.W.* estimated that Missouri judges should have easier go of sorting out the doctrine than federal judges because, “[i]n contrast to the federal system, the subject matter jurisdiction of Missouri’s courts is governed directly by the state’s constitution.” 275 S.W.3d at 253.

7. *J.C.W.*, 275 S.W.3d at 254.

8. *Id.*

9. Traditions’ tenacious hold and individuals’ resistance to change calls to mind the celebrated poem by Robert Frost, “Mending Wall,” which depicts two farmers who devotedly repair each spring a stone fence separating their farms. Neither farmer needs a fence, but one farmer, smitten by tradition, endures the arduous task in unthinking deference to an adage his father taught him: good fences make good neighbors. The other farmer readily recognizes that the fence is not needed but faithfully maintains it simply because he always has. ROBERT FROST, *Mending Wall*, in NORTH OF BOSTON 11, 11-13 (1915).

10. NICCOLÒ MACHIAVELLI, THE PRINCE 27 (Peter Constantine, trans., Modern Library 2008) (“Men intrinsically do not trust new things that they have not experienced themselves.”).

11. *State ex rel. KCP&L Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14, 44 n.12 (Mo. App. W.D. 2011) (Welsh, J., dissenting).

Adding to judges' confusion was the Supreme Court's failure to lay down clear rules in *J.C.W.* In explaining how judges should handle statutes that make jurisdictional-sounding requirements, *J.C.W.* instructed only that they should "read [them] as merely setting statutory limits on remedies or elements of claims for relief that courts may grant."¹² In other words, judges are to treat such restrictions as non-jurisdictional rules. But *J.C.W.* did not say whether all statutory restrictions are non-jurisdictional – even those setting time deadlines or those giving an administrative agency exclusive jurisdiction over a particular subject matter. Judges trying to apply *J.C.W.* spent much time debating these matters.¹³ As former United States Supreme Court Justice Potter Stewart observed, "The art of being a judge, if there is such an art, is in announcing clear rules"¹⁴

But the most notable consequence of *J.C.W.*'s simplified approach is its effect on adjudication by Missouri administrative agencies. The General Assembly granted these agencies exclusive jurisdiction in special areas, such as on-the-job accidents, based on the perception that these subjects require expertise and specialized knowledge.¹⁵ In *McCracken v. Wal-Mart Stores East, L.P.*,¹⁶ the court relied heavily on *J.C.W.* to conclude that a statute making workers' compensation the exclusive remedy for on-the-job accidents¹⁷ was merely a non-jurisdictional statutory restriction.¹⁸ *McCracken* over-

12. *J.C.W.*, 275 S.W.3d at 255.

13. Confirming Judge Welsh's observation that, after *J.C.W.*, Missouri's judges found themselves in a quandary concerning any use of the term "jurisdiction," see *supra* text accompanying note 11, the court in *Evans v. Empire District Electric Co.* noted the appellate court's struggle to determine whether failure to exhaust administrative remedies is a jurisdictional issue and the dispute between the Eastern and Western districts concerning the matter. 346 S.W.3d 313, 317 (Mo. App. W.D. 2011). Moreover, the cases cited in Part III.E. *infra* chronicle the courts' struggle to analyze time deadlines, previously deemed jurisdictional issues, according to the *J.C.W.* analytical paradigm.

14. Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1393 (1983). A couple of years before *J.C.W.*, a law student commenting on a confusing line of Missouri cases used Justice Stewart's observation to admonish the court of its need to articulate clear rules. Alison K. Spinden, *Slurred Speech and Double Vision: Missouri's Supreme Court is Unsteady on DWI Standard*, 72 MO. L. REV. 1411, 1411 (2007). The Supreme Court of Missouri acknowledged the need to resolve the confusion in *White v. Director of Revenue*, 321 S.W.3d 298, 307 n.8 (Mo. 2011) (en banc).

15. See generally *Killian v. J & J Installers, Inc.*, 802 S.W.2d 158, 160 (Mo. 1991) (en banc) ("[C]ourts will not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after that tribunal has rendered its decision: (1) where administrative knowledge and expertise are demanded").

16. 298 S.W.3d 473 (Mo. 2009) (en banc).

17. MO. REV. STAT. § 287.120 (Supp. 2012).

18. *McCracken*, 298 S.W.3d at 475.

turned a long line of cases holding that the Division of Workers' Compensation has jurisdiction exclusive of the circuit courts to determine workers' compensation cases.¹⁹ The court said those cases "confused the concept of a circuit court's jurisdiction . . . with the separate issue of the circuit court's *statutory or common law authority* to grant relief in a particular case."²⁰ It decided that the division's exclusive jurisdiction over workplace accidents was not jurisdictional at all, but was merely a waivable affirmative defense.²¹

McCracken portends significant modifications to how the state courts perceive the interrelation between Missouri administrative agency adjudications and circuit courts' jurisdictional power. The courts' treatment of exclusive administrative remedies as non-jurisdictional issues has the potential to undermine administrative agencies' effectiveness in addressing society's manifold problems.²² *McCracken* compels trial judges to proceed with adjudicating workers' compensation cases masquerading as tort actions – even when the facts clearly demonstrate that the claims arose out of an on-the-job accident – unless the parties assert workers' compensation as an affirmative defense, and only then if they properly assert it.²³ One of the key consequences of *McCracken* is that the judiciary's enforcement of an exclusive administrative remedy depends entirely on the parties' requesting it.²⁴

Moreover, the decision's analysis raises the highly undesirable prospect of unwieldy dual lines of cases: one adjudicated by administrative agencies, and another potentially conflicting line adjudicated in the circuit courts. Not only does the likelihood of unacceptable forum shopping emerge, but the court's decision also threatens to undercut administrative agencies' policies and ability to deal with the problems that motivated the General Assembly to establish them in the first place.²⁵

McCracken's conclusions seem to rest on a faulty and weak foundation. In deducing that workers' compensation exclusivity is a non-jurisdictional affirmative defense,²⁶ the court misperceived workers' compensation precedent. The primary reason for rethinking *McCracken*'s analysis is that the

19. *Id.* at 474.

20. *Id.* at 477.

21. *Id.*

22. As the Supreme Court of Missouri has recognized, applying expertise in finding solutions to society's problems is the *raison d'être* for the state's administrative agencies. *Killian v. J & J Installers, Inc.*, 802 S.W.2d 158, 160 (Mo. 1991) (en banc). Robert Glicksman and Richard Levy have observed that "administrative agencies have proliferated because they are an efficient and effective means of implementing important public policies." ROBERT GLICKSMAN & RICHARD LEVY, *ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT* 21 (2010).

23. *McCracken*, 298 S.W.3d at 477.

24. *See id.*

25. *State ex rel. KCP&L Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14, 51 (Mo. App. W.D. 2011) (Smart, J., dissenting).

26. *McCracken*, 298 S.W.3d at 477.

court apparently failed to appreciate that the circuit courts' jurisdiction is not an all-or-nothing matter. Recognition of workers' compensation as an exclusive remedy is not mutually exclusive to the circuit courts' plenary subject matter jurisdiction. Sound analysis was available to the *McCracken* court that would have permitted exclusive agency remedies and plenary circuit court jurisdiction to peacefully coexist.²⁷

Because the centerpiece of both *J.C.W.*'s and *McCracken*'s analyses was the wording of Missouri's constitutional provision granting jurisdiction to the circuit courts, Part II examines this provision, including its impetus. Part III considers *J.C.W.*'s exposition of jurisdiction and focuses on its contention that the Missouri Constitution necessarily excludes statutory restrictions on the judiciary's exercise of subject matter jurisdiction. Part IV closely examines *McCracken*'s application of *J.C.W.*'s analysis to the issue of exclusive administrative remedies and agency jurisdiction. Finally, Part V suggests alternative analyses that maintain exclusive remedies for workers' compensation and other administrative agencies while preserving the circuit courts' plenary subject matter jurisdiction.

II. THE CONSTITUTION'S BROAD GRANT OF SUBJECT MATTER JURISDICTION

A. *Significance of the Scope of the Circuit Courts' Subject Matter Jurisdiction*

In *J.C.W.*, the Supreme Court held that a statute prohibiting a circuit court from considering a child custody dispute because one of the parties had not posted a bond was not jurisdictional.²⁸ The court held that the Missouri Constitution forbids the statute from affecting the court's subject matter jurisdiction over the lawsuit.²⁹ Instead, the statutory restriction must be treated as a non-jurisdictional issue. If an issue does not involve jurisdiction, it necessarily must be a non-jurisdictional matter – either a matter of procedure, or of the substantive merits on which a lawsuit will be determined.³⁰

27. Four alternatives to the *McCracken* court's analysis – each of which would permit exclusive agency remedies and plenary circuit court jurisdiction to coexist – are set out in Part V *infra*. These alternatives include (1) properly distinguishing between jurisdictional and non-jurisdictional facts; (2) interpreting the Missouri Constitution's grant of plenary jurisdiction to circuit courts to not include administrative adjudications; (3) deeming exclusive administrative remedies that masquerade as tort actions to be non-justiciable; and (4) reinstating the doctrine of primary jurisdiction in Missouri's jurisprudence.

28. 275 S.W.3d 249, 254 (Mo. 2009) (en banc).

29. *Id.* at 255.

30. *Id.* at 254. The court read the requisite bond to put a limit “on remedies or elements of claims for relief that courts may grant.” *Id.* at 255.

The court's analysis rested almost entirely on its interpretation of Article V, section 14(a) of the Missouri Constitution, which states, "The circuit courts shall have original jurisdiction over all cases and matters, civil and criminal."³¹ The *J.C.W.* Court emphasized the provision's "plenary terms"³² and apparently interpreted its reference to "all cases and matters" as encompassing the universe of civil and criminal cases.³³ By giving the circuit court authority to hear any civil or criminal case, the *J.C.W.* court reasoned, the constitution necessarily prohibits any restriction that would decrease the circuit court's jurisdictional power and render it less than all-encompassing.³⁴

The statutory restriction at issue in *J.C.W.* prohibited the circuit court from considering a petition for modification of a child custody decree under certain conditions, including a petitioner's failure to post of a bond.³⁵ On the grounds that the Missouri Constitution forbade treating the statute as jurisdictional, the *J.C.W.* court concluded that the circuit court could heed the statute only by deeming it non-jurisdictional.³⁶ "When a statute speaks in jurisdictional terms or can be read in such terms," the court instructed, "it is proper to read it as merely setting statutory limits on remedies or elements of claims for relief that courts may grant."³⁷ In other words, the court's position is that, because the circuit courts' subject matter jurisdiction is plenary, the only impediments that the General Assembly can impose on the circuit courts' exercise of subject matter jurisdiction are non-jurisdictional rules concerning procedure and substantive merits of a cause of action.

The issue is quite crucial in its effect on the adjudicative process. If a rule is jurisdictional, the circuit court is duty-bound to enforce it, even if it must do so *sua sponte*,³⁸ but if a rule is non-jurisdictional, the circuit court cannot enforce it unless a party requests enforcement of the rule and does so in a proper manner.³⁹ This renders the non-jurisdictional rule merely a matter

31. MO. CONST. art. V, § 14(a) (1945, as amended 1976).

32. *J.C.W.*, 275 S.W.3d at 253.

33. The court never says that it believes section 14(a)'s reference to "all cases and matters" is all-encompassing, but see *infra* Part III.C for discussion of why this inference seems to be valid.

34. *J.C.W.*, 275 S.W.3d at 253-54.

35. The statute said:

When a person filing a petition for modification of a child custody decree owes past due child support to a custodial parent in an amount in excess of ten thousand dollars, such person shall post a bond in the amount of past due child support owed as ascertained by the division of child support enforcement or reasonable legal fees of the custodial parent, whichever is greater, before the filing of the petition.

MO. REV. STAT. § 452.455.4 (2000), *repealed by* H.B. 481, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009).

36. *J.C.W.*, 275 S.W.3d at 255.

37. *Id.*

38. *See id.* at 254.

39. *See id.* at 257-58.

of the parties' trial strategy. Moreover, as *J.C.W.* emphasized, courts tend to enforce jurisdictional rules much more strictly and zealously than they do non-jurisdictional procedural rules.⁴⁰ Judges tend to heed jurisdictional rules "rigidly, literally, and mercilessly,"⁴¹ partly because they understand that acting without jurisdiction can render their judgments a nullity. Mistaken application of a non-jurisdictional rule will, at worst, constitute reversible error, and the mistake will typically go unaddressed unless a party preserves the error for appeal by raising it at the proper time. Furthermore, unlike jurisdictional rules, non-jurisdictional issues rarely constitute a basis for a collateral attack of the court's judgment.

The court in *McCracken* read *J.C.W.*'s point concerning statutory restrictions as applying to statutes that mandate exclusive administrative remedies, such as workers' compensation.⁴² This understanding of *J.C.W.* has significant ramifications for the operation of administrative agencies in Missouri. These agencies derive virtually all of their authority from statutes; therefore, treating statutes that delegate jurisdiction to administrative agencies as mere non-jurisdictional rules can substantially thwart the General Assembly's ability to establish agencies with exclusive, unshared authority. Thus, because *J.C.W.*'s analysis hinged entirely on its interpretation of Article V, section 14(a), tracing that provision's history is beneficial for a complete understanding of the interrelation between circuit courts' subject matter jurisdiction and administrative agencies' exclusive jurisdiction.

B. Reason for the Constitution's Broad Grant of Jurisdictional Power to the Circuit Courts

The present wording of Article V, section 14(a) emerged in 1976 after much of Missouri's bureaucracy had functioned for decades.⁴³ Before then, section 14 expressly provided authority for the legislature to establish administrative agencies and to grant those agencies exclusive jurisdiction. The former section 14 declared that the state circuit courts had original jurisdiction "over all criminal cases *not otherwise provided for by law*, exclusive original jurisdiction in all civil cases *not otherwise provided for*, and concurrent and appellate jurisdiction as provided by law."⁴⁴ Section 14 thus made

40. *Id.* at 251 ("[Jurisdiction] has magic because it can make judgments disappear, as in: 'The judgment is a nullity because the court lacked jurisdiction.'").

41. Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1, 5 (1994).

42. *McCracken v. Wal-Mart Stores E., L.P.*, 298 S.W.3d 473, 479 (Mo. 2009) (en banc).

43. Workers' compensation, for example, began functioning in 1927, and the Public Service Commission came into existence in 1913. *Bethel v. Sunlight Janitor Serv.*, 551 S.W.2d 616, 618 (Mo. 1977) (en banc); *About the PSC*, MO. PUB. SERV. COMM'N., http://psc.mo.gov/General/About_The_PSC (last visited Aug. 20, 2013).

44. MO. CONST. art. V, § 14 (amended in 1976) (emphasis added).

the circuit courts' original jurisdiction subject to other provisions of law, including the General Assembly's statutes.

The impetus for amending section 14 was the reorganization of the state's multi-tiered system of trial courts. Before the reorganization, the trial courts consisted of a confusing array of independent courts, some of which were unique to a particular location.⁴⁵ Circuit courts operated alongside separate probate and magistrate courts and an odd mixture of courts with unique, independent jurisdictions, typically established by statute, in locales such as St. Louis and Hannibal.⁴⁶ Each acted independently of, and at times in conflict with, each other.⁴⁷

Appearing on the August 1976 primary election ballot,⁴⁸ Missouri voters narrowly approved⁴⁹ a twenty-six page proposal that completely overhauled the court system. It merged all but the municipal courts into a single, unitary circuit court system.⁵⁰ This reorganization required repeal of statutes setting the previous courts' jurisdictions, but drafters of the reform measures feared that they would not be able to find all of the statutes needing to be repealed.⁵¹ The drafters' apprehension caused them to propose deleting section 14's ref-

45. Carter Stith, *Amendment No. 6 Would Abolish Complex Court System in St. Louis*, ST. LOUIS POST-DISPATCH, July 19, 1976, at 3B.

46. *Id.* An example of one of the courts with unique jurisdiction was the Court of Criminal Corrections in St. Louis. *Id.* This court was established in 1866 "for reasons no one seems to recall, but possibly to give city politicians an extra wedge of patronage to spread; or possibly to remove minor criminal matters from the hands of justices of the peace." *Id.*

47. *See id.*

48. Officials put the measure on the primary election ballot in August rather than on the general election ballot in November to ward off an initiative petition calling for a different set of reform measures being circulated by a citizens' group. Ted Gest, *Judicial Amendment Is Compromise*, ST. LOUIS POST-DISPATCH, July 20, 1976, at 3B. The group's aim was to get their countermeasures on the November general election ballot. *Id.* Gov. Christopher Bond preempted their effort by putting the General Assembly's proposal, backed by the Supreme Court and the Missouri Bar leadership, on the August primary election ballot. *Id.*

49. Only 51.6 percent of the slightly more than one million votes cast favored reform. *Primary Election Returns: Vote on Proposed Constitutional Amendments Nos. 1, 2, 3, 4, 5, 6, and 7 at Special Election Tuesday, August 3, 1976*, in 1977-1978 OFFICIAL MANUAL OF STATE OF MISSOURI 1255, 1257 (Kenneth M. Johnson, ed. 1979). The vote count was 518,521 in favor and 485,536 opposed. *Id.*

50. Richard J. Hardy & Joseph J. Carrier, *Missouri Courts, Judges, and Juries*, in MISSOURI GOVERNMENT AND POLITICS 173, 174-75 (Richard J. Hardy et al. eds., Univ. of Missouri Press rev. & enlarged ed. 1995); *see also* Charles B. Blackmar, *Missouri's Nonpartisan Court Plan from 1942 to 2005*, 72 MO. L. REV. 199, 207-08 (2007).

51. Interview with Alex Bartlett, Attorney (January 20, 2012) [hereinafter Bartlett Interview]. The Missouri Bar retained Bartlett, a Jefferson City attorney, to aid with the Missouri Bar's push for court reform. *Id.*

erence to other provisions of law, with the effect of granting the reorganized circuit courts plenary jurisdiction.⁵²

The drafters did not propose the deletion because they perceived a need for plenary jurisdiction or other change in policy; it was strictly a matter of pragmatics.⁵³ They proposed the deletion only out of concern for protecting the reform effort, which was not without its opponents,⁵⁴ from an attack against the newly-formed courts' jurisdiction.⁵⁵ Drafters feared that a successful attack on the courts' jurisdiction could arise from some obscure statute originally attached to one of the previously independent courts that had not been repealed.⁵⁶

To reformers, the deletion seemed the simplest, most straightforward solution.⁵⁷ Having been rebuffed for more than a decade by the General Assembly, reformers feared losing the opportunity presented by the legislature's sudden change of heart, which came under the threat of reformers taking the matter directly to voters.⁵⁸ A constitutional grant of plenary power would overcome any forgotten statute that might be dragged from the recesses of the statute books.⁵⁹

A key point in section 14(a)'s history is that the drafters did not intend for the judiciary's broadened jurisdiction to affect or alter operation of the Division of Workers' Compensation or any other state administrative agency.⁶⁰ Indeed, as the drafters strategized and deliberated, they never gave any thought to administrative agencies or their jurisdiction.⁶¹ Unanticipated consequences are a hazard of any reform effort,⁶² certainly when the reformation is of the magnitude of Missouri's court reorganization. Nonetheless,

52. *Id.*

53. *Id.*

54. Although opposition to the reform was low key and not organized, a few opponents, including a citizens group that had pushed for more extensive reform measures, spoke out against the proposal. Gest, *supra* note 48. What criticism that was voiced tended to be overshadowed by one of six other proposed constitutional amendments appearing on the ballot, a proposal to modify the strict ban of Missouri's constitution on state assistance to church-related schools. Dana L. Spitzer, *Nonpublic School Aid A Hot Issue for August*, ST. LOUIS POST-DISPATCH, June 20, 1976, at 1B.

55. Bartlett Interview, *supra* note 51.

56. *Id.*

57. *Id.*

58. *Id.* The General Assembly had begrudgingly relented to repeated calls for reorganizing Missouri's confusing court system only when the Missouri Bar and an independent citizens group initiated separate petition drives that would have bypassed the legislature by taking the issue directly to voters. *Judicial Reform Vote is Tuesday*, ST. LOUIS POST-DISPATCH, Aug. 1, 1976, at 2J.

59. Bartlett Interview, *supra* note 51.

60. *Id.*

61. *Id.*

62. Machiavelli, *supra* note 10, at 27 ("Nothing is harder to do, more dubious to succeed at, or more dangerous to manage than . . . introducing a new order.").

the court reorganization and the amendment of section 14 undoubtedly had a negative effect on administrative agencies' jurisdictional authority as perceived by the Supreme Court of Missouri in *McCracken*.

*C. Initial Perceptions of the Amendment's Effect on
Administrative Agencies' Jurisdictional Authority*

After the amendment of section 14 became effective on September 2, 1976,⁶³ administrative agencies continued to function as they always had, and the courts continued to enforce exclusive administrative remedies as a matter of jurisdiction.⁶⁴ Not until 1991, in *Goodrum v. Asplundh Tree Expert Co.*, did Missouri's appellate courts consider a contention that the amendment of section 14 affected an administrative agency's exclusive authority to adjudicate subject matter assigned to it by the General Assembly.⁶⁵ One of the questions in *Goodrum* was whether the amended section 14 granted circuit courts concurrent jurisdiction with the Division of Workers' Compensation.⁶⁶ The plaintiffs asserted that, because the circuit courts could hear all civil cases and matters, claimants had a choice of filing their action with the division or in the civil courts.⁶⁷

The plaintiffs in *Goodrum* were the parents of a man who died from ingesting a substance – apparently a narcotic – given to him by his work foreman during work hours.⁶⁸ The parents sought to avoid a workers' compensation remedy in favor of pursuing a tort remedy against the decedent's employer.⁶⁹ They sued their son's former employer and foreman for negligence

63. 1975-76 MO. LAWS 819-34.

64. See, e.g., *State ex rel. MW Builders, Inc. v. Midkiff*, 222 S.W.3d 267, 268 (Mo. 2007) (en banc); *State ex rel. Tri-Cnty. Elec. Coop. Ass'n v. Dial*, 192 S.W.3d 708, 712 (Mo. 2006) (en banc); *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6, 7 (Mo. 1992); *Killian v. J & J Installers, Inc.*, 802 S.W.2d 158, 161 (Mo. 1991) (en banc); *State ex rel. McDonnell Douglas Corp. v. Ryan*, 745 S.W.2d 152, 154 (Mo. 1988) (en banc), *overruled by McCracken v. Wal-Mart Stores E., L.P.*, 298 S.W.3d 473 (Mo. 2009) (en banc); *Jones v. Jay Truck Driver Training Ctr., Inc.*, 709 S.W.2d 114, 115 (Mo. 1986) (en banc), *overruled by McCracken*, 298 S.W.3d 473; *State ex rel. McDonnell Douglas Corp. v. Luten*, 679 S.W.2d 278, 279 (Mo. 1984) (en banc).

65. *Goodrum*, 824 S.W.2d at 12. Because the court handed down its decision on January 28, 1992, an assumption that the appellate courts began considering it during 1991 seems fairly safe.

66. *Id.*

67. *Id.* at 11-12. The plaintiffs asserted several other constitutional attacks before arguing that section 14 granted the circuit court concurrent jurisdiction over the lawsuit. *Id.* at 7. That the plaintiffs did not put a lot of stock in this argument seems to be a safe assumption.

68. *Id.* The court described the substance as "white cross" and reported that it apparently caused the decedent to suffer sun-stroke, cardio-respiratory arrest, and acute renal failure. *Id.* He died twenty days after reacting to the substance. *Id.*

69. See *id.*

and intentional tort.⁷⁰ The circuit court sustained the employer's motion to dismiss on grounds that, because the matter implicated workers' compensation statutes, the division had exclusive jurisdiction over the matter, including the power to determine whether the decedent's injuries resulted from an accident or intentional conduct.⁷¹ The *Goodrum* court agreed that the division had "exclusive jurisdiction" to determine the issue and the circuit court properly dismissed the case.⁷² In rejecting the contention that the circuit court had concurrent jurisdiction, the court explained that "Article V, the Judicial Article, is devoted to governing the courts and judges, and we do not read the [1976] amendment [to section 14] as a constraint upon the previously established power of the administrative agencies."⁷³ Thus, the court properly understood the amendment. It did not affect the division's exclusive jurisdiction over workers' compensation cases, and it did not extend the circuit courts' jurisdiction beyond traditional civil actions to include administrative adjudicative cases.⁷⁴ The amendment simply did not accord circuit courts concurrent jurisdiction with administrative agencies.⁷⁵

Missouri appellate courts did not again consider a challenge to the exclusivity of the workers' compensation remedy until *McCracken*.⁷⁶ For seventeen years, Missouri courts persisted in treating exclusive administrative remedies as jurisdictional rules.⁷⁷ After the 1976 constitutional amendment and *Goodrum*, little changed in the way Missouri courts analyzed workers' compensation statutes or any other statutes according an exclusive administrative remedy.⁷⁸ Until 2009, when the *J.C.W.* court imparted its lesson on jurisdiction, Missouri's courts continued to assume that the Division of

70. *Id.*

71. *Id.*

72. *Id.* at 8.

73. *Id.* at 12.

74. *See id.*

75. *See id.*

76. *McCracken v. Wal-Mart Stores E., L.P.*, 298 S.W.3d 473, 478 (Mo. 2009) (en banc) (finding only pre-1992 cases considering jurisdiction of the workers' compensation defense).

77. As late as 2009, Missouri's appellate courts still deemed a circuit court to lack subject matter jurisdiction if a petitioner's claim fell within the provisions of workers' compensation statutes. *See, e.g., Olendorff v. St. Luke's Episcopal-Presbyterian Hosps.*, 293 S.W.3d 47, 49 (Mo. App. E.D. 2009) ("A motion to dismiss for lack of subject matter jurisdiction is a proper means of raising the workers' compensation law as a defense to a common law tort action."); *Battles v. United Fire & Cas. Co.*, 295 S.W.3d 486, 487 (Mo. App. W.D. 2009) (mem.) (affirmed circuit court's dismissal of lawsuit "for lack of subject matter jurisdiction because plaintiff's exclusive remedy for her alleged injuries falls under the workers' compensation law").

78. *See* Joseph H. Guffey & Nathan D. Sturycz, *Asserting the Workers' Compensation Exclusive Remedy Bar After McCracken*, 66 J. MO. BAR 206, 206 (2010).

Workers' Compensation had exclusive jurisdiction to adjudicate any workers' compensation claim to the exclusion of the circuit courts.⁷⁹

III. *J.C.W.*'S FUNDAMENTAL LESSON IN JURISDICTION

J.C.W. was a domestic relations case involving issues of child custody and child support.⁸⁰ At the center of the controversy was a statute⁸¹ imposing conditions on the circuit court's authority to consider the petitioner's claim.⁸² The appellate courts considering the statute deemed it to be a jurisdictional bar to the circuit court adjudicating the matter; however, they could not agree on how to characterize the jurisdictional issue.⁸³ The appellate judges characterized the issue variously as a matter of personal jurisdiction,⁸⁴ subject matter jurisdiction, and jurisdictional competency.⁸⁵ In *J.C.W.*, the Supreme Court of Missouri declared that all three characterizations were wrong; the statute did not raise a jurisdictional issue at all.⁸⁶ The court explained that the statute was a non-jurisdictional rule that pertained to matters of procedure.⁸⁷ In light of the appellate courts' mischaracterization of the statute, the Supreme Court perceived a need in *J.C.W.* to give a fundamental lesson in jurisdiction.

Subpart A recounts the issues in dispute in *J.C.W.* that motivated the court's lesson in jurisdiction. Subpart B focuses on the first point of the court's lesson: rejection of the concept of jurisdictional competence and recognition of only two forms of jurisdiction – personal and subject matter. In tracing the history of Missouri courts' recognition of jurisdictional competency prior to *J.C.W.*, subpart B confirms the court's conclusion that jurisdictional competency was merely a form of subject matter jurisdiction. Subpart C considers the second and cornerstone point of the court's lesson: that the subject matter jurisdiction of Missouri's circuit courts is plenary in scope. This point opened the door to the *McCracken* court's conclusion that the circuit courts have subject matter jurisdiction in all cases, even those in which

79. *See id.* at 206-07.

80. *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 256 (Mo. 2009) (en banc).

81. MO. REV. STAT. § 452.455.4 (2000), *repealed by* H.B. 481, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009). This statute is set out in full *supra* note 35.

82. *J.C.W.*, 275 S.W.3d at 252.

83. *See id.*

84. *See Miller v. Miller*, 210 S.W.3d 439, 444 (Mo. App. W.D. 2007), *abrogated by J.C.W.*, 275 S.W.3d 249.

85. In considering *J.C.W.* before its transfer to the Supreme Court of Missouri, the Eastern District Court of Appeals deemed the statute to raise either an issue of subject matter jurisdiction or "jurisdictional competence." *J.C.W.*, 275 S.W.3d at 252.

86. *Id.*

87. *Id.* at 255.

the General Assembly has granted exclusive jurisdiction to an administrative agency. Subpart D addresses the court's failure in *J.C.W.* to make an all-important distinction between jurisdictional and non-jurisdictional fact-finding, and subpart E shows how this failure has caused confusion among judges trying to apply *J.C.W.*'s lesson.

A. *The Dispute in J.C.W.*

In *J.C.W.*, Kelly Webb petitioned the circuit court for approval to move with her two children from Missouri to California.⁸⁸ She summoned the children's father, Jason Wyciskalla, who responded by filing a motion asking the circuit court, *inter alia*, to alter the child custody arrangement and his child support obligations.⁸⁹ After a hearing, the circuit court denied Webb's request to relocate, granted Wyciskalla's motion for modification of the custody arrangement, and declared that Wyciskalla had no child support obligations.⁹⁰ On appeal, a central issue was whether the circuit court could enter its order in light of Missouri Revised Statutes section 452.455.4.⁹¹ This statute requires parties seeking a change in child custody to post a bond if they are more than \$10,000 in arrears in their child payments.⁹² The *J.C.W.* court acknowledged that the statute's "plain language" prohibited Wyciskalla from filing his motion to alter child custody.⁹³

Before resolving the issue of the General Assembly's power to prohibit the filing of a petition, the court seized upon the opportunity to lay down a six-paragraph, three-point lesson on the basics of jurisdiction.⁹⁴ First, it declared that Missouri courts recognize only two kinds of jurisdiction – not three, as the *J.C.W.* court believed its intermediate appellate judges to be suggesting.⁹⁵ According to the court, the only types of jurisdiction cognizable by Missouri courts are personal jurisdiction and subject matter jurisdiction.⁹⁶ *J.C.W.* thus sounded the death knell for the concept of jurisdictional competency, long understood by Missouri courts as an essential element of jurisdiction.⁹⁷ Second, *J.C.W.* interpreted the Missouri Constitution as granting plenary subject matter jurisdiction to the circuit courts and declared that such jurisdiction includes not only the circuit courts' authority to adjudicate a category of cases (civil cases and matters and criminal cases and matters) but

88. *Id.*

89. *Id.* at 256.

90. *Id.*

91. *Id.* at 252. Section 452.455.4 is set out *supra* note 35.

92. § 452.455.4; *see also J.C.W.*, 275 S.W.3d at 252.

93. *J.C.W.*, 275 S.W.3d at 256.

94. *Id.* at 252-54.

95. *Id.* at 252.

96. *Id.*

97. *Id.* at 254.

also any issue affecting adjudication of a particular case.⁹⁸ Third, it concluded that, in light of the circuit courts' plenary jurisdiction, any statute imposing conditions on a circuit court's authority to adjudicate a case must be treated as a waivable, non-jurisdictional rule.⁹⁹

B. Missouri Courts Recognize Only Two Kinds of Jurisdiction

Concerning the first point of *J.C.W.*'s jurisdiction lesson was that "Missouri courts recognize only two kinds of jurisdiction: subject matter jurisdiction and personal jurisdiction,"¹⁰⁰ it is debatable whether Missouri courts ever recognized more than two *kinds* of jurisdiction. For more than a century before *J.C.W.*,¹⁰¹ Missouri was among a number of states that divided jurisdiction into three *elements* – or "essentials."¹⁰² Missouri courts did not begin dubbing the third essential as "jurisdictional competency" – a term apparently unique to Missouri in this use – until around 1941,¹⁰³ but Missouri courts did not view the concept as a separate category of jurisdiction. Rather, they deemed it to be an *element* of a court's overall jurisdictional authority along with jurisdiction's other two elements: the subject of the lawsuit (subject matter jurisdiction) and the court's authority over the parties (personal jurisdiction).¹⁰⁴

98. *Id.* at 253-54.

99. *See id.* at 254-55.

100. *Id.* at 252.

101. *See infra* notes 108-111 and accompanying text.

102. Although labeled various ways – in many cases only as "the third element of jurisdiction" – a concept identical to Missouri's jurisdictional competency has been recognized in sixteen other states. *Lewis v. Palmer*, 67 Ariz. 189, 195, 193 P.2d 456, 459-460 (1948); *Morgan v. Hartford Hosp.*, 301 Conn. 388, 401, 21 A.3d 451, 459 (2011); *Arcadia Citrus Growers Ass'n. v. Hollingsworth*, 135 Fla. 322, 326, 185 So. 431, 433 (1938); *People v. Moran*, 977 N.E.2d 801, 806 (Ill. Ct. App. 2012); *City of Gary v. Major*, 822 N.E.2d 165, 170 (Ind. 2005); *Moeller v. Moeller*, 175 Kan. 848, 858, 267 P.2d 536, 543 (1954); *Newell Enters., Inc. v. Bowling*, 158 S.W.3d 750, 757 (Ky. 2005); *Fries v. Carpenter*, 567 A.2d 437, 439 (Me. 1989); *People v. Redman*, 250 Mich. 334, 340, 230 N.W. 196, 198 (1930) (Potter, J. dissenting); *Peisker v. Chavez*, 46 N.M. 159, 123 P.2d 726, 728-729 (1942); *Ashikian v. Okla. ex rel. Okla. Horse Racing Comm'n.*, 2008 OK 64, 188 P.3d 148, 154 (2008); *Payne v. Com. Dept. of Corr.*, 813 A.2d 918, 935 (Pa. 2002); *Isham v. Sienknecht*, 59 S.W. 779, 784 (Tenn. Ct. App. 1900); *Alvarado v. Okla. Sur. Co.*, 281 S.W.3d 38, 41 (Tex. App. 2005); *Drewry v. Doyle*, 179 Va. 715, 720, 20 S.E.2d 548, 551 (1942); *State v. Barnes*, 146 Wn. 2d 74, 85, 43 P.3d 490, 496 (2002) (en banc).

103. The first case found to attach the "competency" label to the concept was *State ex rel. Lambert v. Flynn*, 154 S.W.2d 52 (Mo. 1941) (en banc).

104. *See generally* Scott Stephens, *Florida's Third Species of Jurisdiction*, 82 FLA. B. J. 11 (2008) (proposing that jurisdiction is a "legal conclusion" that is dependent on the presence of three elements). As described in this Article, Florida courts

J.C.W. was correct, however, that what Missouri courts called jurisdictional competency actually was what most courts consider to be a component of subject matter jurisdiction. Indeed, a hornbook definition of subject matter jurisdiction is that it is “the *competency* of a court to hear and decide particular categories of cases.”¹⁰⁵ *J.C.W.* decided that continued recognition of jurisdictional competency had sufficient “potential ill effects”¹⁰⁶ that, henceforth, Missouri judges must “confine their discussions of circuit court jurisdiction to constitutionally recognized doctrines of personal and subject matter jurisdiction”¹⁰⁷ With that, jurisdictional competency died unceremoniously.

1. History of the Concept of Jurisdictional Competency

The history of jurisdictional competency in Missouri makes clear that Missouri courts had not treated the concept as a separate category of jurisdiction, as the *J.C.W.* court suggested. Instead, courts perceived the concept to be a matter of proper pleading – that a court did not have jurisdiction unless a party had pleaded a cause of action for which the court could grant relief.

The concept of jurisdictional competency originated in Missouri in 1891 with *Hope v. Blair*.¹⁰⁸ In that case, the Supreme Court of Missouri relied on a New Jersey Supreme Court decision¹⁰⁹ in concluding that jurisdiction has “three essentials”: “*First*, the court must have cognizance of the class of cases to which the one adjudged belongs; *second*, the proper parties must be present; and, *third*, the point decided must be, in substance and effect, within the issue.”¹¹⁰ The point of the third element, as explained by the *Hope* court, was that a court did not have jurisdiction to consider a claim that was not included in the pleadings:

A court may be said to have jurisdiction of the subject-matter of a suit when it has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed. What the controversy or issue, in any case is, can only be determined from the pleadings.¹¹¹

label the concept as “procedural jurisdiction.” *Id.* at 11. It is virtually identical to Missouri’s jurisdictional competency. See *Flynn*, 154 S.W.2d at 57.

105. TEPLY & WHITTEN, *supra* note 6, at 41 (emphasis of “competency” added).

106. *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 254 (Mo. 2009) (en banc).

107. *Id.*

108. 16 S.W. 595 (Mo. 1891).

109. *Munday v. Vail*, 34 N.J.L. 418 (N.J. 1871).

110. *Hope*, 16 S.W. at 597 (quoting *Munday*, 34 N.J.L. at 422) (internal quotations marks omitted).

111. *Id.*

When the Supreme Court revisited the issue of jurisdictional competency three years later in *Charles v. White*, it noted that the concept had gained wide acceptance.¹¹² The court, however, made a confusing observation: “[W]e think that the trend of the courts of this country is to enlarge the definition of jurisdiction with the statement that it should, properly defined, include not only the power to hear and determine, but power to render the particular judgment in the particular case.”¹¹³ As a close study of *Hope* and *White* reveals, jurisdictional competence did not broaden jurisdiction’s definition. Instead, it referred only to circumstances in which “the court proceeds beyond the allegations of the pleadings and the prayer for relief and decrees a matter between parties defendant”¹¹⁴

When the Supreme Court of Missouri took up the matter of jurisdictional competency again three decades later in *State ex rel. Lambert v. Flynn*, the court still deemed the concept to refer to a jurisdictional requirement that a petitioner’s pleading state a cause of action.¹¹⁵ The facts in *Flynn* were similar to those in *J.C.W.* A former police officer seeking disability retirement benefits sued the St. Louis Board of Trustees of the Police Retirement Pension System.¹¹⁶ The board contested the circuit court’s jurisdiction on the ground that the petition did not plead that petitioner complied with statutory requirements that he submit his claim to the board before filing his civil action.¹¹⁷ The Supreme Court previously held that the statutory requirements were jurisdictional.¹¹⁸ The *Flynn* court concluded that the petition “did not state a cause of action over which respondent could exercise jurisdiction.”¹¹⁹ In response to the argument that the board waived jurisdiction by appearing in court and filing an answer, the *Flynn* court said:

[The argument assumes] that the circuit court had jurisdiction of the subject matter, and that the question was as to jurisdiction over the person. Such is not the fact. It is said that the jurisdiction of a court to adjudicate a controversy rests on three essentials: (1) jurisdiction of subject matter; (2) jurisdiction of the *res* or the parties; (3) and jurisdiction to render the particular judgment in the particular case. The first two are the grand subdivisions of jurisdiction. Jurisdiction of the subject matter is derived from the law and cannot be conferred by con-

112. *Charles v. White*, 112 S.W. 545, 549 (Mo. 1908) (citing court decisions in Indiana, Colorado, Minnesota, and West Virginia as accepting the view).

113. *Id.* (internal quotations omitted).

114. *Id.*

115. 154 S.W.2d 52, 57 (Mo. 1941).

116. *Id.* at 54.

117. *Id.* at 55.

118. See *State ex rel. Lambert v. Padberg*, 145 S.W.2d 123, 126 (Mo. 1940) (en banc) (holding that whether a circuit court obtains jurisdiction is dependent on the law at the time the action was filed).

119. *Flynn*, 154 S.W.2d at 56.

sent. Jurisdiction over the person may be waived because it is a personal privilege.

But the third essential, jurisdiction to render the particular judgment in the particular case, (sometimes called ‘competency’), partakes of the character of one or the other of the first two. Where the lacking element of jurisdiction goes to the personal privilege of the litigant, it may be waived. It is said in 21 C.J.S. [sec. 84]: “If the court cannot try the question except under particular conditions or when approached in a particular way, the law withholds jurisdiction unless such conditions exist or unless the court is approached in the manner provided, and consent will not avail to change the provision of the law in this regard.” In the instant case [the circuit] court had no power to try the case *until* statutory conditions had been complied with and administrative remedies had been exhausted, and also unless these facts were shown by the petition upon which respondent’s jurisdiction was invoked. It partook of jurisdiction of the subject matter and could not be waived by mere appearance of the [board].¹²⁰

The *Flynn* court, thus, did not view jurisdictional competency as a third category of jurisdiction, but as an “essential” to the exercise of jurisdiction.¹²¹ Like *Hope* and *Charles*, *Flynn* tied jurisdictional competency to the plaintiff’s or petitioner’s filing a cause of action for which relief could be granted.¹²² Because the petitioner in *Flynn* failed to state a proper cause of action, Missouri’s supreme court concluded that the circuit court did not have competency to exercise its power over the lawsuit.¹²³

As *J.C.W.* noted, *Flynn* did not question the circuit court’s subject matter jurisdiction;¹²⁴ rather, *Flynn* readily acknowledged that the circuit court had general authority to adjudicate the subject matter.¹²⁵ *Flynn*’s holding was that the petitioner’s failure to plead a cause of action for which relief could be granted rendered the circuit court incompetent to exercise its jurisdictional authority.¹²⁶ Rather than resulting from confusion concerning jurisdiction, as *J.C.W.* surmised,¹²⁷ the *Flynn* court’s analysis hinged on a statutory requisite,

120. *Id.* at 57 (first citation omitted) (emphasis added).

121. *Id.*

122. *See id.*

123. *Id.*

124. *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 254 (Mo. 2009) (en banc) (“[T]hese cases do not question the court’s subject matter or personal jurisdiction and really go to the court’s authority to render a particular judgment in a particular case.” (citations omitted)).

125. *See Flynn*, 154 S.W.2d at 57.

126. *Id.*

127. *See J.C.W.*, 275 S.W.3d at 254.

which at the time did not conflict with Missouri's constitution.¹²⁸ It merely expressed a concept now embodied in Missouri's law of civil procedure: failure to state a cause of action is jurisdictional because the petition does not assert a case or matter, depriving the court of subject matter jurisdiction.¹²⁹ As Missouri Rule of Civil Procedure 55.27(f) provides, failure to state a claim upon which relief can be granted is not among the defenses that can be waived;¹³⁰ obviously, this is because it is jurisdictional.

In light of this Article's focus on the application of *J.C.W.*'s analysis to administrative agencies, an interesting aside is the Supreme Court of Missouri's reading of *Flynn* just three years before *J.C.W.* in *In re Marriage of Hendrix*.¹³¹ In that case, the court approved *Flynn*'s conclusion that jurisdictional competence properly applied in the "narrow circumstance[]" of a party's failure to exhaust administrative remedies.¹³²

Notwithstanding previous courts' use of jurisdictional competency to refer to a requirement that a petitioner plead a cause of action, the *J.C.W.* court decided that the time for rejecting the concept had come.¹³³ Misperceiving the doctrine as a third category of jurisdiction, the court concluded that the concept was inconsistent with Article V, section 14(a) of the Missouri Constitution.¹³⁴ "Because the authority of a court to render judgment in a particular case is, in actuality, the definition of subject matter jurisdiction," the court reasoned, "there is no constitutional basis for this third jurisdictional concept for statutes that would bar litigants from relief."¹³⁵ In addition, *J.C.W.* decided the doctrine's demise was necessary for pragmatic reasons. The court feared that continued recognition would erode the circuit courts' subject mat-

128. At the time of the *Flynn* decision in 1941, the Missouri Constitution granted the circuit courts "exclusive original jurisdiction in all civil cases *not otherwise provided for* . . ." MO. CONST. art. V, § 14 (amended 1976) (emphasis added).

129. See *State ex rel. Union Elec. Co. v. Dolan*, 256 S.W.3d 77, 82 (Mo. 2008) (en banc) ("[T]he failure to state a cause of action is a jurisdictional defect because there is no subject matter on which the court can take jurisdiction.").

130. This rule says:

If a party makes a motion under this Rule 55.27 but omits therefrom any defense or objection then available that this Rule 55.27 permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in Rule 55.27(g)(2) on any of the grounds there stated.

MO. SUP. CT. R. 55.27(f). A defense of failure to state a claim upon which relief can be granted is among the defenses listed in Missouri Rule of Civil Procedure 55.27(g)(2).

131. 183 S.W.3d 582 (Mo. 2006) (en banc).

132. *Id.* at 588 (citing *State ex rel. Lambert v. Flynn*, 154 S.W.2d 52, 57 (Mo. 1941)).

133. *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 254 (Mo. 2009) (en banc).

134. *Id.*

135. *Id.*

ter jurisdiction and tempt litigants “to label every statutory restriction on claims for relief as a matter of jurisdictional competence.”¹³⁶ Only the first two reasons – lack of a constitutional basis and potential erosion of circuit courts’ subject matter jurisdiction – appear to have true significance.¹³⁷

J.C.W. is correct, however, that after the 1976 amendment of Article V the constitution does not specifically provide for statutory restrictions.¹³⁸ And, in light of section 14(a)’s grant of plenary subject matter jurisdiction, the provision is open to an interpretation that statutory restrictions of the circuit courts’ jurisdictional power are inconsistent with the constitution. A cogent counterargument can be made, however, that the constitution’s grant of plenary power to the circuit courts is not inconsistent with all statutory restrictions. Notably, the grant of plenary power arguably is not inconsistent with the General Assembly’s delegation of exclusive jurisdiction to an administrative agency.¹³⁹

The *J.C.W.* court’s second reason for refusing to recognize jurisdictional competence was its apprehension that the doctrine eroded the principle of separation of powers and “rob[bed] the concept of subject matter jurisdiction of the clarity that the constitution provides.”¹⁴⁰ Again, this conclusion may be true for such statutory restrictions as section 452.455.4. But, by implying that an exclusive administrative remedy should be treated like section 452.455.4 – a lesson that the *McCracken* court gleaned from *J.C.W.* – the decision has the potential effect of eroding the separation of powers doctrine in the opposite direction. It could diminish the General Assembly’s inherent, plenary power to grant unfettered, exclusive jurisdiction to administrative agencies.¹⁴¹ As separate, but complementary, arms of government, the circuit courts and administrative tribunals should function effectively side-by-side, each with their unique jurisdictions, rather than assume adjudicative baili-

136. *Id.*

137. Undoubtedly, litigants can be expected to characterize any issue or matter in a way that works to their benefit – so long as it is within the confines of ethical practices, of course. Indeed, one of the developments since *McCracken* has been that litigants and judges characterize any issue that before *J.C.W.* had been dubbed jurisdictional as “authority” to proceed. See *infra* Part III.E. Surely the burden should fall on judges’, rather than litigants’, shoulders to discern and ward off mischaracterizations of the law.

138. See *J.C.W.*, 275 S.W.3d at 252-54 (“Elevating statutory restrictions to matters of ‘jurisdictional competence’ erodes the constitutional boundary established by article V of the Missouri Constitution.”).

139. See *infra* Part V.B. for a discussion of such an interpretation.

140. *J.C.W.*, 275 S.W.3d at 254.

141. See *Akin v. Dir. of Revenue*, 934 S.W.2d 295, 299 (Mo. 1996) (en banc) (“Our constitution in article III, § 1, invests the General Assembly with broad, plenary, legislative powers . . .”).

wicks with no thought of the effects on the other tribunal.¹⁴² As will be discussed later in this Article, *McCracken*'s application of *J.C.W.*'s simple approach to exclusive administrative remedies opened up the potential for erosion of the concept that the judiciary and administrative tribunals are to function as cooperative arms of effective government.¹⁴³

2. Distinguishing Personal Jurisdiction from Subject Matter Jurisdiction

Apparently prompted by the intermediate appellate courts' variously characterizing section 452.455.4 as personal jurisdiction and subject matter jurisdiction, *J.C.W.* discerned a need to distinguish between these two grand elements of jurisdiction.¹⁴⁴ Each element, the court noted, answers separate questions concerning the adjudicative process.¹⁴⁵ Personal jurisdiction answers the question of an entity's power over *whom*.¹⁴⁶ Subject matter jurisdiction answers the question of power over *what*.¹⁴⁷

J.C.W. defined personal jurisdiction as the "power of a court to require a person to respond to a legal proceeding that may affect the person's rights or interests."¹⁴⁸ It clarified that a lack of personal jurisdiction "means simply that the constitutional principle of due process bars [the court] from affecting the rights and interests of a particular person, whether such a 'person' be an individual or an entity such as a corporation."¹⁴⁹ On the other hand, *J.C.W.* defined subject matter jurisdiction as "the court's authority to render a judgment in a particular *category* of case."¹⁵⁰ Indeed, as commentators have explained, subject matter jurisdiction is "the competency of a court to hear and

142. See *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 73-74 (Mo. 1982) (*en banc*) ("The purpose of the doctrine of separation of powers . . . is to prevent the abuses that can flow from centralization of power. While the autonomy of the legislative, executive, and judicial branches lies at the heart of our system of government . . . Each branch constitutes only a part of a single government and must interact harmoniously with the other two. The independence of the branches must be consistent with that chain of connection that binds the whole fabric of the Constitution in one indissoluble bond of union and amity . . . From a pragmatic standpoint it is obvious that some overlap of functions necessarily must occur. The complexity of modern government demands the delegation of some administrative and decisional authority to executive agencies because of their particular areas of expertise." (citations omitted) (internal quotation marks omitted)).

143. See *infra* Parts IV.B, C.

144. See *J.C.W.*, 275 S.W.3d at 252.

145. See *id.* at 253.

146. *Id.* at 252-53.

147. *Id.* at 253.

148. *Id.*

149. *Id.*

150. *Id.* (emphasis added).

decide particular *categories* of cases”¹⁵¹ and refers to a court’s authority to adjudicate the *type* of controversy, or *class* of cases, *sub judice*.¹⁵² Professors Allen Ides and Christopher May explained, “‘Type’ refers to the nature of the controversy, *e.g.*, civil claims in general, probate proceedings, marriage dissolution, etc.”¹⁵³ But, *J.C.W.* also defined subject matter jurisdiction as “the authority of a court to render judgment in a particular case”¹⁵⁴ Missouri’s sister jurisdictions concur that subject matter jurisdiction refers both to the category of cases and to issues pertaining to the court’s authority to render judgment in a particular case. For example, the Minnesota Supreme Court has defined subject matter jurisdiction as “a court’s authority to hear and determine a particular class of actions and the particular questions presented to the court for its decision.”¹⁵⁵

Hence, subject matter jurisdiction, so defined, encompasses the domain of what Missouri courts identified before *J.C.W.* as the third element of jurisdiction: the “power to render the particular judgment in the particular case.”¹⁵⁶ *J.C.W.* concluded, therefore, that any issue or statute not focused on a court’s power over the parties and that involves the adjudicative process in virtually any manner constitutes subject matter jurisdiction.¹⁵⁷ Consequently, the *J.C.W.* court determined that any statutory impediment to a Missouri court’s power to adjudicate a case or matter cannot, by definition, be jurisdictional.¹⁵⁸ As the previous definitions indicate, any such statute would constitute a limitation on subject matter jurisdiction in contravention of the Missouri Constitution’s granting the circuit courts exclusive subject matter jurisdiction.

J.C.W., however, did not distinguish among the various statutory restrictions.¹⁵⁹ The court seemed to view a statute like section 452.455.4 and its bond requirement similar to a statute establishing an exclusive administrative remedy. Of course, pursuant to its inherent legislative power, the General Assembly is still free to enact such statutes, but *J.C.W.*’s lesson was that Missouri courts must treat such statutes as non-jurisdictional.

151. TEPLY & WHITTEN, *supra* note 6.

152. 1 ROBERT C. CASAD & WILLIAM B. RICHMAN, JURISDICTION IN CIVIL ACTIONS: TERRITORIAL BASIS AND PROCESS LIMITATIONS ON JURISDICTION OF STATE AND FEDERAL COURTS § 1-1 (3d ed. 1998).

153. ALLAN IDES & CHRISTOPHER N. MAY, CIVIL PROCEDURE: CASES AND PROBLEMS 279 (2d ed. 2006).

154. *J.C.W.*, 275 S.W.3d at 254.

155. *Giersdorf v. A & M Constr., Inc.*, 820 N.W.2d 16, 20 (Minn. 2012) (internal quotations omitted).

156. *See supra* text accompanying note 113.

157. *See J.C.W.*, 275 S.W.3d at 252-54.

158. *See id.* at 254.

159. *See id.*

3. Effect of Treating Statutory Restrictions as Non-Jurisdictional Rules

Treating a statute as non-jurisdictional has significant practical effects on the adjudicatory process. The most notable effect is that it moves the burden of enforcing the rule from the court to the parties. The courts have no obligation to see that a non-jurisdictional rule is enforced because these rules concern matters of personal privilege and are imposed primarily for the parties' benefit. A party waives its rights to enforcement of a non-jurisdictional rule by failing to assert it at the proper time.¹⁶⁰

This was a key lesson that the *McCracken* court gleaned from *J.C.W.* The *McCracken* court perceived *J.C.W.*'s approach as requiring it to treat even a statute that completely abolished a cause of action as non-jurisdictional.¹⁶¹ *McCracken* inferred from *J.C.W.* that a trial court should proceed with adjudicating the case, even if it recognized that the action implicated a cause that no longer existed.¹⁶²

C. The Circuit Courts' Subject Matter Jurisdiction is Plenary

The second point of *J.C.W.*'s jurisdiction lesson is that Article V, section 14(a) grants Missouri circuit courts plenary subject matter jurisdiction.¹⁶³ *J.C.W.*'s emphasis on section 14(a)'s "plenary terms"¹⁶⁴ lent itself to the *McCracken* court's conclusion that the circuit courts' original jurisdiction over "all cases and matters, civil and criminal," is broad enough to include even administrative adjudications.¹⁶⁵ Later, while addressing how to handle non-jurisdictional rules, the opinion treated alike all statutes imposing impediments on a circuit court proceeding without regard for the nature of the impediment.¹⁶⁶

The *J.C.W.* court inferred that, if the subject matter jurisdiction of Missouri circuit courts is all-encompassing, the circuit courts have authority to hear any case.¹⁶⁷ Thus, the circuit courts' subject matter jurisdiction includes cases and matters of whatever kind, even administrative adjudication. Hence,

160. *McCracken v. Wal-Mart Stores E., L.P.*, 298 S.W.3d 473, 477 (Mo. 2009) (en banc).

161. *See id.* at 479.

162. *See id.* at 477-78.

163. *J.C.W.*, 275 S.W.3d at 253.

164. *Id.*

165. *McCracken*, 298 S.W.3d at 476-77 (quoting MO. CONST. art. V, § 14).

166. *J.C.W.*, 275 S.W.3d at 255 ("When a statute speaks in jurisdictional terms or can be read in such terms, it is proper to read it as merely setting [non-jurisdictional] limits on remedies or elements of claims for relief that courts may grant.").

167. *See J.C.W.*, 275 S.W.3d at 254.

a circuit court judge's task of determining whether its court has subject matter jurisdiction in any given lawsuit is "simple."¹⁶⁸ *J.C.W.* explained:

Applying [the jurisdictional basics set out in *J.C.W.*]¹⁶⁹ makes simple the task of determining jurisdiction: The present case is a civil case. Therefore, the circuit court has subject matter jurisdiction and, thus, has the authority to hear this dispute. The circuit court also has the power to render a judgment that binds the parties, who both are residents of Missouri. Therefore, it has personal jurisdiction.¹⁷⁰

D. Distinguishing Jurisdictional and Non-Jurisdictional Fact-Finding

A significant issue in *J.C.W.* was who sets the amount of the bond required by section 452.455.4: the circuit court or the Division of Child Support Enforcement, the relevant state administrative agency.¹⁷¹ The court analyzed the issue:

If, as Mother claims, Father did in fact owe more than \$10,000 in child support arrearages, the plain language of section 452.455.4 would prohibit him from filing a motion to modify. The statute says that the bond shall be in the amount of past child support "owed as ascertained by the division of child support enforcement or reasonable legal fees of the custodial parent, whichever is greater, before the filing of the petition." . . . Father cannot be barred from judicial relief by a factual determination made by the division of child support in the absence of an opportunity for judicial review of the issue.¹⁷²

The *J.C.W.* court resolved the issue by framing it as a matter of separation of powers. "Article I, section 14 [of the Missouri Constitution]," the court reasoned, "provides that the 'courts of justice shall be open to all.' This means that the key to the courthouse door cannot be in the hands of an enforcement agency."¹⁷³

An alternative way of resolving the issue of who is to set bond, especially in light of *J.C.W.*'s emphasis on jurisdiction, is to understand the issue as a matter of jurisdiction. The amount of the bond is a jurisdictional fact, and

168. *Id.*

169. *J.C.W.* actually said, "Applying this principle to the present case makes simple the task of determining jurisdiction[.]" *Id.* The principle discussed in the previous paragraph was jurisdictional competence. *Id.* The court obviously did not intend for "this principle" to refer to jurisdictional competence. Apparently, the court was referring to its entire discussion of jurisdiction. *See id.*

170. *Id.*

171. *See id.* at 256-57.

172. *J.C.W.*, 275 S.W.3d at 256-57 (citation omitted).

173. *Id.* at 257.

jurisdictional facts – those determining whether or not an entity has the power to hear and determine a case¹⁷⁴ – are always questions of law.¹⁷⁵ Courts decide questions of law.¹⁷⁶ Thus, as a question of law, the circuit court and not the Division of Child Support Enforcement should have determined the amount of the bond.

E. J.C.W.’s Simple Approach Creates Confusion

As appealing as *J.C.W.*’s simple approach is, it did not prove to be quite so simple in Missouri courts’ early attempts at application. *J.C.W.*’s analysis caused confusion among Missouri judges as they struggled to understand *J.C.W.*’s scope. Judges encountered difficulty determining whether *J.C.W.*’s approach truly applies to every restraint on the adjudicatory process, statutory or otherwise.

A good example of this confusion involves the time constraints on filing motions for post-conviction remedies.¹⁷⁷ Before *J.C.W.*, Missouri courts declared it was obligatory to dismiss any motion filed beyond deadlines set by the Supreme Court’s rules because those deadlines were jurisdictional.¹⁷⁸ After *J.C.W.*, the Supreme Court of Missouri continued to declare that courts were obligated to dismiss motions for missed deadlines, but it offered no explanation for the basis of the dismissal,¹⁷⁹ leaving Missouri’s intermediate appellate courts to struggle with the issue. Confusion ensued.

In *Swofford v. State*, the court acknowledged *J.C.W.*’s instruction concerning jurisdiction and read the decision to require that a deadline set out in the Missouri Supreme Court rules was no longer a jurisdictional matter.¹⁸⁰ The *Swofford* court decided to use what it described as its inherent “power and duty to enforce Missouri Supreme Court rules” to dismiss a late-filed motion deadline even though the state’s attorney did not object until appeal.¹⁸¹ The court reasoned that its inherent power authorized it to disregard “whether or not the state raised the issue [at the trial level] or on appeal because the state cannot, by failing to object, waive a movant’s noncompliance

174. Harold M. Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on a Trichotomy*, 102 NW. U. L. REV. 1547, 1547-48 (2008).

175. *Greene v. St. Louis Cnty.*, 327 S.W.2d 291, 296 (Mo. 1959) (“Unless the jurisdictional facts appear upon the record no jurisdiction is conferred and none can be exercised.”) (citing *Whitely v. Platte County*, 73 Mo. 30, 31 (1880)).

176. *Asbury v. Lombardi*, 846 S.W.2d 196, 200 (Mo. 1993) (en banc) (“The quintessential power of the judiciary is the power to make *final* determinations of questions of law.”).

177. See *Snyder v. State*, 334 S.W.3d 735, 737 (Mo. App. W.D. 2011).

178. *Clark v. State*, 261 S.W.3d 565, 569 & n.1 (Mo. App. E.D. 2008).

179. See *Gehrke v. State*, 280 S.W.3d 54, 57 (Mo. 2009) (en banc).

180. 323 S.W.3d 60, 62-63 (Mo. App. E.D. 2010).

181. *Id.* at 63-64.

with the time constraints of the post-conviction relief rules.”¹⁸² The court apparently deemed *J.C.W.*’s lesson as primarily a labeling issue – that is, it could treat the deadline as a jurisdictional rule so long as it did not refer to the issue as jurisdiction.

Struggling with the same issue, the court in *State ex rel. Scroggins v. Kellogg*¹⁸³ took a similar position but used different analysis. Although *J.C.W.* did not mention restrictions imposed by the Supreme Court’s rules, the *Kellogg* court read *J.C.W.* as applying to restrictions of all kinds, including those set out in rules of procedure.¹⁸⁴ Although the *Kellogg* court understood *J.C.W.* to require that it treat the rule of procedure as non-jurisdictional, it still treated the rule as jurisdictional by dismissing a post-conviction motion only because it was filed late notwithstanding the lack of objection by the state.¹⁸⁵ Its only explanation for the court dismissing the motion was that “a statute or rule . . . may still limit the court’s ability to grant a remedy.”¹⁸⁶

In *Snyder v. State*, the court addressed the same issue but disagreed with *Swofford* and *Kellogg*.¹⁸⁷ The *Snyder* court viewed *J.C.W.* and *McCracken* as requiring circuit courts to treat the state’s failure to object to a missed deadline as a waiver of the issue.¹⁸⁸ Although the deadline surely was not imposed for the benefit of the state, the *Snyder* court concluded that *J.C.W.* required it to treat the deadlines as a matter of personal privilege, subject to waiver by the state’s attorney at his or her discretion.

As evidenced by these decisions, Missouri judges have responded to *J.C.W.* by treating all restrictions on their authority, whether imposed by statute or by rule, as involving merely a matter of labeling. Judges adopted a practice of substituting the term “authority” for any ruling that they would have called an issue of jurisdiction before *J.C.W.* but still treating the issue as a matter of jurisdiction.¹⁸⁹ They use “authority” to describe a court’s power

182. *Id.* at 63.

183. 311 S.W.3d 293 (Mo. App. W.D. 2010).

184. *See id.* at 296-97.

185. *Id.* at 298.

186. *Id.* at 297.

187. 334 S.W.3d 735, 738-39, 738 n.6 (Mo. App. W.D. 2011).

188. *Id.* at 738-39 (quoting *McCracken*’s declaration that “if a matter is not jurisdictional but rather is a procedural matter required by statute *or* rule or an affirmative defense of the sort listed in Rule 55.08, then it generally may be waived if not raised timely.”).

189. The judges adopted the practice from the Supreme Court’s opinions. In *McCracken*, the court noted that previous courts had “confused the concept of a circuit court’s jurisdiction . . . with the separate issue of the circuit court’s *statutory or common law authority* to grant relief in a particular case.” *McCracken v. Wal-Mart Stores E., L.P.*, 298 S.W.3d 473, 477 (Mo. 2009) (en banc). In *State ex rel. Praxair, Inc. v. Missouri Public Service Commission*, the court cited *J.C.W.* in declaring that a previous decision, *State ex rel. AG Processing, Inc. v. Thompson*, 100 S.W.3d 915 (Mo. App. W.D. 2003), had improperly used “the term ‘jurisdiction’ [when] the more appropriate term would be authority.” 344 S.W.3d 178, 192 n.9 (Mo. 2011) (en banc).

to make a ruling, render a judgment, review a petition, or simply proceed with adjudication¹⁹⁰ and continue on, using the same analysis it used before *J.C.W.*

Hence, rather than clarifying and simplifying jurisdiction, as the Supreme Court of Missouri hoped, *J.C.W.* resulted in form over substance in Missouri courts. Of more significance, *J.C.W.*'s simple approach to jurisdiction, which failed to provide clear rules for distinguishing jurisdictional and non-jurisdictional rules, has created unnecessary confusion concerning the power of administrative agencies to exercise their exclusive jurisdiction. As applied by *McCracken*, *J.C.W.* portends significant change in how courts should analyze statutes granting administrative agencies, such as the Division of Workers' Compensation, exclusive jurisdiction.

IV. *McCracken*'S APPLICATION OF *J.C.W.* TO EXCLUSIVE ADMINISTRATIVE REMEDIES

A. *Workers' Compensation Remedy is an Affirmative Defense*

Ten months after handing down *J.C.W.*, the Supreme Court of Missouri applied *J.C.W.*'s jurisdictional lesson in *McCracken*, a case implicating workers' compensation statutes.¹⁹¹ The *McCracken* court ruled that, although the circuit court found plaintiff's case to be within the exclusive jurisdiction of the Division of Workers' Compensation, the circuit court erred by dismissing the lawsuit for lack of jurisdiction.¹⁹² The circuit court dismissed the lawsuit because it determined the plaintiff was the defendant's statutory employee,¹⁹³ and, according to sound precedent at the time, any claim filed against a plaintiff's statutory employer was within the division's exclusive jurisdiction.¹⁹⁴ The *McCracken* Court held, however, that this precedent re-

190. *E.g.*, *Mansheim v. Dir. of Revenue*, 357 S.W.3d 273, 277 n.5 (Mo. App. E.D. 2012) ("authority to review [a] petition"); *Wright v. Bartimus, Frickleton, Robertson & Gorny*, 364 S.W.3d 558, 565 n.6 (Mo. App. W.D. 2011) ("authority" to render a particular judgment").

191. *McCracken*, 298 S.W.3d at 475.

192. *Id.*

193. *Id.* at 474-75. MO. REV. STAT. § 287.040.1 (Supp. 2012) states:

Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor, his sub-contractors, and their employees, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.

194. *Harris v. Westin Mgmt. Co. E.*, 230 S.W.3d 1, 2-3 (Mo. 2007) (en banc); *Romero v. Kan. City Station Corp.*, 98 S.W.3d 129, 137 (Mo. App. W.D. 2003). MO. REV. STAT. § 287.120.2 (Supp. 2012) says:

The rights and remedies [granted by the Workers' Compensation Act] to an employee shall exclude all other rights and remedies of the employee, his

sulted from “confused” analysis,¹⁹⁵ and it summarily overruled the prior cases.¹⁹⁶ “To treat workers’ compensation defenses differently,” the court declared, “would promote ‘continued confusion in the courts as to whether a court’s error[] in following a statute . . . [is] jurisdictional in nature.’”¹⁹⁷

The plaintiff in *McCracken* filed a negligence action against the operator of a Walmart store in Neosho.¹⁹⁸ The plaintiff alleged that a Walmart employee negligently caused a delivery rack to fall on him as he delivered bread to the store.¹⁹⁹ The plaintiff averred that his employer, Interstate Brands, settled his workers’ compensation claim against it.²⁰⁰ But, on the day trial was to begin, Walmart filed a motion to dismiss in which it asserted that the plaintiff was its statutory employee and, therefore, the division had exclusive jurisdiction over the matter as a workers’ compensation claim.²⁰¹ After a hearing on the issue, the circuit court agreed with Walmart that the plaintiff was Walmart’s statutory employee and dismissed the plaintiff’s complaint for lack of jurisdiction.²⁰²

In reversing the circuit court’s dismissal, the *McCracken* court drew upon its understanding of *J.C.W.* to hold that the circuit court had jurisdiction regardless of what workers’ compensation statutes said.²⁰³ Merely because the plaintiff’s complaint averred a negligence action, the court concluded that “the [Workers’ Compensation] Act could not overrule the provision of Article V, section 14 giving circuit courts jurisdiction over personal injury claims.”²⁰⁴

The *McCracken* court instructed that the circuit court should have ignored the issue of whether the matter was a workers’ compensation claim because the issue did not implicate jurisdiction at all.²⁰⁵ It explained that the provision of workers’ compensation statutes for an exclusive administrative remedy constitutes an affirmative defense because these statutes are merely non-jurisdictional rules.²⁰⁶ Thus, the parties could choose to waive the right

wife, her husband, parents, personal representatives, dependents, heirs or next kin, at common law or otherwise, on account of such injury or death . . .

195. *McCracken*, 298 S.W.3d at 477.

196. *Id.* at 479 (“To the extent that these . . . cases hold that the [Workers’ Compensation] Act’s applicability is a matter of the trial court’s subject matter jurisdiction, they are overruled.”).

197. *Id.* (citing *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 254 (Mo. 2009) (en banc)) (alterations in original).

198. *Id.* at 475-76.

199. *Id.* at 475.

200. *Id.*

201. *Id.* at 476.

202. *Id.*

203. *Id.* at 476-77.

204. *Id.* at 475, 479.

205. *Id.* at 475-76.

206. *Id.* at 478-79.

to have the Division of Workers' Compensation adjudicate the case in favor of trying the matter in circuit court as a negligence action.²⁰⁷

In actuality, the lawsuit proceeded in the circuit court much like the *McCracken* court envisioned that it should.²⁰⁸ Consistent with the *McCracken* court's charted course, the circuit court assumed until immediately before trial that it had subject matter jurisdiction over the plaintiff's negligence suit.²⁰⁹ The circuit court persisted in this assumption until the defendant, in a last-minute motion to dismiss, called the circuit court's attention to its belief that the plaintiff was its statutory employee, making the matter a workers' compensation case.²¹⁰ The circuit court immediately convened a hearing, decided the defendant was correct – a decision the *McCracken* court ruled was wrong²¹¹ – and dismissed the plaintiff's lawsuit on the grounds that the division, rather than the circuit court, had jurisdiction over the matter.²¹² The *McCracken* court said this was the point at which the circuit court's handling of the case went awry.

According to *McCracken*, the circuit court erred by allowing Walmart to raise its contention that the plaintiff was a statutory employee in a motion to dismiss because the matter should have been raised as an affirmative defense.²¹³ By taking up the issue in a motion to dismiss, *McCracken* reasoned, the circuit court necessarily treated the matter of the exclusivity of the workers' compensation remedy as a *jurisdictional* issue.²¹⁴ *McCracken* was correct that the trial court *did* treat the issue as jurisdictional, but it obviously did so because the Supreme Court's previous cases had declared the matter to be jurisdictional.²¹⁵ *McCracken* rejected these cases as wrongly decided, stating that they were the results of "sloppy" analysis.²¹⁶ *McCracken* explained that "the issue [of whether or not the plaintiff is a statutory employee] is not a

207. *Id.* at 479.

208. *See id.* at 478.

209. *Id.* at 476.

210. *Id.*

211. *Id.* at 481.

212. *Id.* at 476.

213. *Id.* at 477.

214. *Id.* at 479.

215. Just two years earlier, the Supreme Court of Missouri said:

As noted in *James v. Poppa*, 85 S.W.3d 8, 9 (Mo. banc 2002), a motion to dismiss for lack of subject matter jurisdiction is an appropriate means of raising the workers' compensation law, chapter 287, as a defense to a common law tort action. A court shall dismiss the action whenever it appears that the court lacks subject matter jurisdiction. As the term 'appears' suggests, the quantum of proof is not high; it must appear by the preponderance of the evidence that the court is without jurisdiction.

Harris v. Westin Mgmt. Co. E., 230 S.W.3d 1, 2-3 (Mo. 2007) (en banc) (footnote omitted).

216. *McCracken*, 298 S.W.3d at 478.

jurisdictional one . . .”²¹⁷ because it is not a question that affects the circuit court’s subject matter jurisdiction to decide his claim.”²¹⁸

The *McCracken* court acknowledged that Walmart’s not raising the issue as an affirmative defense would have, under normal circumstances, resulted in the court’s deeming the defense waived.²¹⁹ But, because previous courts “erroneously [treated the workers’ compensation remedy] as a jurisdictional one in the mid-1980s and thereafter,” the court accorded Walmart grace and considered the issue despite its untimely assertion.²²⁰

B. McCracken’s Potential Effect on Exclusive Administrative Law Remedies

McCracken highlights a trap for the unwary defendant. As a non-jurisdictional affirmative defense, workers’ compensation – and presumably any exclusive administrative remedy – is an issue of personal privilege that a party can waive.²²¹ If Walmart was correct that the plaintiff was its statutory employee, waiting until the day of trial to assert a workers’ compensation remedy thwarted the General Assembly mandate of an exclusive remedy.²²² Under *McCracken*’s analysis, the trial court should have deemed the workers’ compensation remedy waived and proceeded with the trial of the plaintiff’s tort claim without regard for whether the Division of Workers’ Compensation had exclusive authority over the claim under the workers’ compensation statutes.

McCracken’s analysis thus jeopardized the exclusivity of the workers’ compensation remedy. This jolting prospect prompted two commentators to ask whether the case was “the opening jab in a bout to knockout (or work around) the exclusive remedy bar established by the Missouri workers’ compensation statute[.]”²²³ Indeed, without exclusivity, workers’ compensation simply cannot function as the legislature intended.²²⁴ *McCracken* opened the door to the possibility that an employee could evade the workers’ compensa-

217. *Id.* at 475.

218. *Id.* at 479.

219. *Id.* at 479.

220. *Id.* at 475.

221. *Id.*

222. MO. SUP. CT. R. 55.27(a) requires that an affirmative defense be asserted in the responsive pleading if one is required. The *McCracken* court excused Walmart’s tardiness “because prior cases had stated that this issue was jurisdictional . . . , [so] the matter will be treated as preserved in this case.” 298 S.W.3d at 475. The court then ruled that the circuit court had erred in finding that the plaintiff was a statutory employee. *Id.*

223. Guffey & Sturycz, *supra* note 78, at 206.

224. Loretta F. Samenga, *Workers’ Compensation: The Exclusivity Doctrine*, 41 LAB. L.J. 13, 15 (1990) (Exclusivity “is and has been the heart and soul of workers’ compensation legislation since its enactment.”).

tion remedy simply by suing his or her employer in a negligence action.²²⁵ As was evident in *Goodrum v. Asplundh Tree Expert Co.*, litigants do at times seek to evade workers' compensation to avoid its perceived drawbacks.²²⁶

While the General Assembly enacted workers' compensation as a benefit to employees, those benefits come with tradeoffs.²²⁷ The most notable downside to workers' compensation for employees is the typically smaller recoveries than those awarded in civil tort actions.²²⁸ To compensate for lower recoveries, the General Assembly built into workers' compensation advantages for employees, such as a "no-fault" approach under which employees are relieved of the burden of proving their employer's liability.²²⁹ An employee can establish employer liability merely by showing that his or her injury arose out of an on-the-job accident.²³⁰ These advantages can be enough of an incentive for employer defendants to want to avoid a workers' compensation remedy. The *McCracken* court apparently recognized these incentives and admonished employees who might try to use tort actions to evade workers' compensation:

[The plaintiff does not have] an undefeatable right to have his claim determined in circuit court just because he chose to file it there in the first instance, without regard to whether he is Wal-Mart's statutory employee or whether his claim is otherwise one that Missouri statutes commit to determination by the [Labor and Industrial Relations] Commission. Rather, it means that this issue should be raised as an

225. See Guffey & Sturycz, *supra* note 78, at 208.

226. 824 S.W.2d 6 (Mo. 1992) (en banc); see discussion of *Goodrum* *supra* notes 65-75 and accompanying text.

227. In *Thomas v. City of Springfield*, the court described the purpose of workers' compensation statutes as

to provide financial and medical benefits to the victims of 'work-connected' injuries and to their families – regardless of fault – and to allocate the financial burden to the most appropriate source, the employer, and, ultimately, the consumer." This policy underlies Missouri's own approach to adjudicating workers' compensation claims . . .

88 S.W.3d 155, 159 (Mo. App. S.D. 2002) (quoting Leslie A. Bradshaw, Annotation, *Suicide as Compensable Under Workmen's Compensation Act*, 15 A.L.R.3d 616, 622 (1967)). Indeed, the driving force behind Missouri's adoption of workers' compensation was labor unions which pushed for it as a benefit for their members. PATRICK J. PLATTER, I MO. WORKERS' COMPENSATION LAW § 1.4 (MoBar, 3d ed. 2004).

228. Samenga, *supra* note 224, at 15-16.

229. See Amanda Yoder, Note, *Resurrection of a Dead Remedy: Bringing Common Law Negligence Back into Employment Law*, 75 MO. L. REV. 1093, 1100 (2010).

230. See *id.*

affirmative defense to the circuit court's *statutory authority to proceed* with resolving his claim.²³¹

This response treats the issue merely as a matter of trial procedure and strategy and fails to appreciate the essential nature of the exclusive remedy to workers' compensation.

A litigant seeking to evade the workers' compensation remedy can be defeated only by a defendant that asserts the workers' compensation statutes properly and in a timely manner – unlike Walmart in *McCracken*.²³² Indeed, a defendant may be quite willing, for strategic reasons, to have a workers' compensation case tried in a civil court rather than by an administrative law judge. After all, the General Assembly established workers' compensation primarily for the benefit of employees.²³³

C. Potential for Dual, Conflicting Lines of Cases

Not only does *McCracken*'s analysis threaten the exclusivity of the workers' compensation remedy, but it also creates the potential for dual contradictory lines of cases.²³⁴ This potential diversion raises, of course, the specter of forum shopping.²³⁵ These potential ill effects were avoided when the Division of Workers' Compensation had exclusive jurisdiction to adjudicate an employee's claim for an on-the-job accident.²³⁶

Dual lines of conflicting cases could undermine the policymaking of the Division of Workers' Compensation.²³⁷ After *McCracken*, an appellate judge warned of the potential for such an undermining.²³⁸ In his dissenting opinion in *State ex rel. KCP&L Greater Missouri Operations Co. v. Cook*, Judge James Smart admonished that the circuit court's adjudication of a claim that, "on its face, purports to have arisen out of an employment relationship" before the division adjudicated it would undermine division policy by allowing "a civil jury the initial right to decide" causation, an issue previously deemed to be within the division's exclusive jurisdiction.²³⁹ Judge Smart characterized such an arrangement – one seemingly adopted by the *McCracken* court – as "a ground-breaking change in the law."²⁴⁰

231. *McCracken v. Wal-Mart Stores E., L.P.*, 298 S.W.3d 473, 477 (Mo. 2009) (en banc).

232. See Mo. SUP. CT. R. 55.08.

233. See sources cited *supra* note 227.

234. See *State ex rel. KCP&L Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14, 51 (Mo. App. W.D. 2011) (Smart, J., dissenting).

235. See *id.*

236. *Id.*

237. See *id.* at 50-51.

238. *Id.*

239. *Id.* at 51.

240. *Id.*

Such a result is groundbreaking because it jeopardizes the very reason for administrative agencies' existence.²⁴¹ As the Supreme Court of Missouri has recognized, expertise is agencies' *raison d'être*.²⁴² For example, briefly after Missouri's first administrative agency, the Public Service Commission, came into existence in 1913, the Supreme Court noted the commission's expert staff and observed that it had "at hand more expert machinery [for rate-making] than any earthly Legislature possesses."²⁴³ Without doubt, the commission has more ratemaking expertise than any circuit court.²⁴⁴ The theory underlying administrative decision-making, including its adjudicatory decisions, is that agencies' streamlined, unencumbered procedures facilitate neutral, expert solutions to society's complex problems more efficiently than what the legislative or judicial branches can deliver.²⁴⁵

Moreover, statutes granting exclusive administrative remedies embody expressions of society's values.²⁴⁶ Missourians were reluctant to join the national movement to substitute workers' compensation remedies for common law tort actions asserting claims for on-the-job accidents.²⁴⁷ When they

241. See generally Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473, 476-77 (2003) (explaining the benefits of using administrative agencies to implement regulatory and benefit programs).

242. See, e.g., *Killian v. J & J Installers, Inc.*, 802 S.W.2d 158, 160 (Mo. 1991) (en banc).

243. *State ex rel. Rhodes v. Pub. Serv. Comm'n*, 194 S.W. 287, 291-92 (Mo. 1917) (en banc). The court further explained:

The situation as to common carriers changes from year to year A fixed, hard and fast rate made one year might be almost confiscatory next year No legislature has the time, nor is it equipped with the machinery necessary to investigate matters of ratemaking in any manner which will serve to prevent its enactment of laws fixing alleged "reasonable maximum rates" from being other than a mere guess.

Id. at 291.

244. See *id.* at 295-96.

245. Levy & Shapiro, *supra* note 241, at 476-77.

246. See *id.* at 503-04.

247. Missourians accepted workers' compensation only after labor forces pushed relentlessly for more than a decade for the reform. PLATTER, *supra* note 227. The General Assembly first considered workers' compensation legislation in 1915, but supporters could not muster enough support to pass a law. *Id.* When on-the-job accidents increased significantly toward the end of World War I, unions pushed harder for workers' compensation, and the General Assembly passed a bill in 1919 after bitter debate. *Id.* The Governor signed it, but business interests mounted a referendum campaign that resulted in the law's repeal by a narrow margin. *Id.* The General Assembly passed another workers' compensation bill in 1923, which the Governor signed, but again opponents were able to get it repealed in a second referendum campaign in which businessmen promised to work with legislators to formulate a better bill. *Id.* The General Assembly passed a compromise bill in 1925, which again was put to a popular vote. *Id.* With labor and business leaders endorsing it, voters ap-

did, they inculcated their values and expectations into the workers' compensation statutes.²⁴⁸ The Supreme Court of Missouri's failure to perceive and apply a jurisdictional rule such as section 287.120.2 frustrates operation of democratic ideals and agency policymaking.

The judiciary's failure to heed traditional jurisdictional boundaries dividing civil actions from administrative adjudications not only compromises the advantages of agency expertise, but it also thwarts uniformity of the law. Inconsistent application of the law results in injustice; outcomes thus become dependent on a litigator's ability to have his case tried by one tribunal rather than another.²⁴⁹

D. Basis for Disputing McCracken's Characterization of Section 287.120.2 as a Non-Jurisdictional Rule

McCracken's characterization of section 287.120.2 as a non-jurisdictional, affirmative defense is subject to dispute. First, the court's characterization relied heavily on early cases that recognized workers' compensation as an affirmative defense.²⁵⁰ *McCracken* failed to recognize that the statutes relied upon by the early decisions were significantly different than the statutes in effect in 2009. Second, a cogent argument can be made that a statute like section 287.120.2, which abolished a civil cause of action and supplanted an administrative remedy for it, is not the same as the statute that was at issue in *J.C.W.*²⁵¹

1. McCracken's Misplaced Reliance on Early Workers' Compensation Cases

Key to the *McCracken* court's conclusion that section 287.120.2 was a non-jurisdictional, affirmative defense was the court's misperception of early workers' compensation cases.²⁵² The court noted that "Missouri courts . . .

proved the measure during the November 1926 election. *Id.*; see also Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900-1930*, 41 J.L. & Econ. 305, 320 n.A1 (1998).

248. See Derek W. Black, *A Framework for the Next Civil Rights Act: What Tort Concepts Reveal About Goals, Results and Standards*, 60 RUTGERS L. REV. 259, 286-87 (2008); Levy & Shapiro, *supra* note 241, at 504.

249. See *State ex rel. KCP&L Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14, 51 (Mo. App. W.D. 2011) (Smart, J. dissenting) (explaining how such inconsistencies can develop).

250. *McCracken v. Wal-Mart Stores E., L.P.*, 298 S.W.3d 473, 478 (Mo. 2009) (en banc) (citing *Warren v. Am. Car & Foundry Co.*, 38 S.W.2d 721 (Mo. 1931) (en banc); *Kemper v. Gluck*, 39 S.W.2d 330 (Mo. 1931) (en banc); *Schneider v. Union Elec. Co.*, 805 S.W.2d 222 (Mo. App. W.D. 1991)).

251. See discussion *supra* Part II.A.

252. See *McCracken*, 298 S.W.3d at 478-79.

required from the first cases addressing the issue in the early 1930s” that parties claiming the exclusive workers’ compensation remedy must assert the remedy “as an affirmative defense under Rule 55.08 rather than by a motion to dismiss where, as here, the worker has chosen to proceed by filing a tort suit.”²⁵³ The court was correct. The early workers’ compensation cases, one of the first being *Kemper v. Gluck* (on which the *McCracken* court relied heavily), did declare that “[w]here an action is at common law and invokes common-law liability only, an exception to such liability created by statute is not an element of the cause of action; it is a matter of defense.”²⁵⁴

McCracken, however, failed to account for a significant difference between workers’ compensation laws in effect in 1931, when the Supreme Court of Missouri handed down *Kemper*, and those governing in 2009. The most notable difference was that the 1931 statutes made workers’ compensation optional.²⁵⁵ They permitted employees and employers to elect “to reject [the Workers’ Compensation] act.”²⁵⁶ The 1931 statutes did not include a provision like section 287.120.2’s mandate that workers’ compensation be the exclusive remedy.²⁵⁷ After the General Assembly established workers’ compensation in Missouri in 1925, it remained an elective remedy until 1974, when the legislature made it compulsory for all employers who had five or more employees.²⁵⁸ The General Assembly expanded workers’ compensation coverage again in 1990 to include all construction industry employers who had employees.²⁵⁹

When the Supreme Court handed down *Kemper*, workers’ compensation had been a part of Missouri statutes for only a few years. The plaintiff in *Kemper* sued her employer in tort for redress of injuries suffered while doing her job as a restaurant waitress, and she won an award.²⁶⁰ On appeal, the employer asserted for the first time that workers’ compensation was the plaintiff’s exclusive remedy.²⁶¹ The *Kemper* court recognized that the predecessor to the Division of Workers’ Compensation, the Compensation Commission, had jurisdiction over such claims in appropriate cases, but it did not deem the issue to be jurisdictional in that particular case because the employer did not

253. *Id.* at 475.

254. 39 S.W.2d 330, 333 (Mo. 1931) (en banc).

255. *Id.* at 331; see also PLATTER, *supra* note 227.

256. *Kemper*, 39 S.W.2d at 331.

257. MO. REV. STAT. § 287.120.2 (2012) (amended 2013) provides:

The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee, his wife, her husband, parents, personal representatives, dependents, heirs or next kin, at common law or otherwise, on account of such injury or death, except such rights and remedies as are not provided for by this chapter.

258. PLATTER, *supra* note 227.

259. *Id.*

260. *Kemper*, 39 S.W.2d at 331.

261. *Id.*

raise workers' compensation in its pleadings.²⁶² The *Kemper* court put the burden on the employer to raise workers' compensation as an affirmative defense for the obvious reason that workers' compensation was *not* the exclusive, mandatory remedy at that time.²⁶³

In 1931, employees and employers could opt out of workers' compensation.²⁶⁴ As a result, the appropriate remedy depended on the election made by the plaintiff or her employer to opt in or out. The election made the issue a matter of pleading, as the *Kemper* court explained in a quotation emphasized by *McCracken*:²⁶⁵ "[t]he burden is upon the party claiming the applicability of the [Workers' Compensation] act to bring himself under it . . . [and] if he would make it a defense, he must plead and prove himself within its terms."²⁶⁶ As an elective program, workers' compensation was an exception to common law liability.²⁶⁷ An employee and employer could opt for a tort remedy rather than workers' compensation. Hence, it was a matter of an affirmative defense.²⁶⁸

All of that changed in 1974 when the General Assembly abolished common law liability – or tort actions for on-the-job accidents – and substituted compulsory workers' compensation.²⁶⁹ Thus, the *McCracken* court's reliance on *Kemper*'s assertion that workers' compensation is a non-jurisdictional affirmative defense, while true when *Kemper* was decided, was misplaced.

2. Workers' Compensation Supplanted Tort Actions for Workplace Injuries

When the General Assembly changed workers' compensation to a mandatory, exclusive remedy in 1974, the statute became a jurisdictional rule. The statute removed the choice not to participate in workers' compensation.²⁷⁰ By making workers' compensation the only remedy for workplace

262. *Id.* at 331-34.

263. *See id.* at 333-34.

264. *Id.* at 331-34. This option obviously was one of the compromises that facilitated passage of workers' compensation in Missouri after several failed attempts. *See* PLATTER, *supra* note 227, at §§1.3-1.4.

265. *McCracken v. Wal-Mart Stores E., L.P.*, 298 S.W.3d 473, 478 (Mo. 2009) (en banc).

266. *Kemper*, 39 S.W.2d at 333.

267. PLATTER, *supra* note 227, at § 1.3.

268. *See Kemper*, 39 S.W.2d at 333-34.

269. PLATTER, *supra* note 227. Those more recent cases to which *McCracken* cited as holding that workers' compensation was an affirmative defense relied on the *Kemper* line and also failed to perceive the effect of the law change. *See McCracken*, 298 S.W.3d at 479.

270. *See* MO. REV. STAT. § 287.030 (2000) (defining the term "employer" for purposes of the Workers' Compensation statutes); § 287.120.1 (Supp. 2012) ("Every

injuries,²⁷¹ the General Assembly did not deprive the circuit courts of jurisdiction to adjudicate claims based on workplace injury or death. Instead, it eliminated a civil cause of action for on-the-job accidents and substituted workers' compensation. As the Supreme Court of Missouri recognized, even after *McCracken*, "The General Assembly . . . has enacted remedies that displace damages actions altogether, in workers compensation proceedings, which substitute administrative proceedings for common law damages actions."²⁷² It was a change the Supreme Court declared to be "unobjectionable."²⁷³

Therefore, workers' compensation arguably does not affect a circuit court's original jurisdiction over civil claims for on-the-job accidents. The *McCracken* court correctly concluded that the issue of whether the case was a workers' compensation matter "is not a question that affects the circuit court's subject matter jurisdiction,"²⁷⁴ but the reason was also not, as the court surmised, that workers' compensation is "an exception to the normal rule that tort cases are determined by the circuit court."²⁷⁵ Rather, the issue was that the General Assembly, pursuant to its legislative prerogative, abolished any tort action for a claim arising out of an accidental on-the-job injury or death. The circuit courts' plenary subject matter jurisdiction includes only "cases and matters, civil and criminal."²⁷⁶ No civil action exists in Missouri whereby an employee can sue his or her employer for a claim arising out of an accidental on-the-job injury or death because the General Assembly abolished it.

An exclusive workers' compensation remedy, therefore, does not usurp the circuit courts' subject matter jurisdiction; it cannot by definition. The circuit courts have no authority or power claim to adjudicate a case or matter that does not exist. The Missouri Constitution grants circuit courts original jurisdiction only over cases and matters that are cognizable. And, in Missouri, no cause of action exists outside of workers' compensation in which a

employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment.").

271. See § 287.120.2 ("The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee, his wife, her husband, parents, personal representatives, dependents, heirs or next kin, at common law or otherwise, on account of such injury or death, except such rights and remedies as are not provided for by this chapter.").

272. *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 779 (Mo. 2010) (en banc).

273. *Id.*

274. *McCracken*, 298 S.W.3d at 479.

275. *Id.*

276. MO. CONST. art. V, § 14.

plaintiff can assert a claim against his or her employer for injuries suffered in an on-the-job accident.

As the United States Supreme Court explained long ago, jurisdiction is a tribunal's power to adjudicate the merits of a case and to "dispose of it as justice may require."²⁷⁷ The Supreme Court of Missouri has agreed: "Subject matter jurisdiction . . . exists *only* when the tribunal has the right to determine the controversy . . . or grant the relief prayed."²⁷⁸ Because the circuit courts have no power to adjudicate claims fitting within the parameters of section 287.120.2, they have no subject matter jurisdiction.²⁷⁹ Hence, the determination of whether a case falls within section 287.120.2 is a jurisdictional issue.

V. ALTERNATIVES TO *MCCRACKEN*'S ANALYSIS

Although the *McCracken* court's analysis focused primarily on protecting the circuit courts' plenary subject matter jurisdiction, the court was mindful that its decision would affect the exclusivity of workers' compensation as a remedy for on-the-job injuries.²⁸⁰ The court did not show a desire to bring about the demise of the exclusive workers' compensation remedy, but it apparently perceived that, to protect the circuit courts' jurisdiction, its only option was to strip jurisdictional status from workers' compensation and any other exclusive administrative remedy. If the court recognized that it had other options, it did not indicate it. The court had at least four alternative approaches to the one applied in *McCracken*. Each has the advantage of protecting the circuit courts' jurisdiction while still according jurisdictional status to the exclusive workers' compensation remedy.

A. *Alternative One: Properly Distinguish Between Jurisdictional and Non-Jurisdictional Facts*

In a distinction seemingly overlooked by the *J.C.W.* court,²⁸¹ jurisdictional facts, in contrast to non-jurisdictional facts, are always questions of law²⁸² for courts to decide.²⁸³ The distinction between jurisdictional facts

277. *The Resolute*, 168 U.S. 437, 439 (1897).

278. *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 72 (Mo. 1982) (en banc) (emphasis added) (internal quotation marks omitted).

279. *See* MO. REV. STAT. § 287.120.2 (Supp. 2012).

280. *McCracken*, 298 S.W.3d at 477 (The circuit courts having subject matter jurisdiction "does not mean that Mr. McCracken has an undefeatable right to have his claim determined in circuit court . . .").

281. *See supra* Part III.D.

282. *Greene v. St. Louis Cnty.*, 327 S.W.2d 291, 296 (Mo. 1959) ("Unless the jurisdictional facts appear upon the record no jurisdiction is conferred and none can be exercised.") (citing *Whitely v. Platte Cnty.*, 73 Mo. 30, 31 (1880)).

and non-jurisdictional facts becomes particularly significant when a civil action implicates statutes mandating an exclusive administrative remedy. In such cases, because administrative agencies are strictly creatures of statute,²⁸⁴ a court's determination of jurisdictional facts necessarily requires statutory construction,²⁸⁵ and statutory construction is an issue of law.²⁸⁶ Thus, the circuit court, not an administrative agency, must determine jurisdictional facts.²⁸⁷ Obviously an administrative agency's determination of its own jurisdiction would be tantamount to allowing an agency to "add to its own powers and create rights and duties beyond what the Legislature provided or intended."²⁸⁸

On the other hand, substantive facts are not matters of law but questions of fact.²⁸⁹ In a case involving an administrative remedy, the administrative agency is to decide such facts.²⁹⁰ These facts define the merits of a case – that is, they concern what conduct, or lack thereof, subjects the actors (or those who fail to act) to liability and who can seek redress for the specified conduct.²⁹¹

The substantive merits of a Missouri workers' compensation case are set out in section 287.120.1. This statute says, "Every employer subject to the provisions of this chapter [who] shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death [conduct] of the employee [who] by accident arising out of and in the course of the employee's employment [conduct]"²⁹² A claimant bears

283. *Asbury v. Lombardi*, 846 S.W.2d 196, 200 (Mo. 1993) (en banc) ("The quintessential power of the judiciary is the power to make final determinations of questions of law.").

284. *State ex rel. Praxair, Inc. v. Mo. Pub. Serv. Comm'n*, 344 S.W.3d 178, 192 (Mo. 2011) (en banc) ("The [Public Service Commission] is an administrative body created by statute and has only such powers as are expressly conferred by statute and reasonably incidental thereto."); *Union Elec. Co. v. Pub. Serv. Comm'n*, 591 S.W.2d 134, 137 (Mo. App. W.D. 1979).

285. *See State ex rel. Mo. Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 598-99 (Mo. 2012) (en banc).

286. *City of St. Joseph v. Vill. of Country Club*, 163 S.W.3d 905, 907 (Mo. 2005) (en banc).

287. *Harris v. Westin Mgmt. Co. E.*, 230 S.W.3d 1, 3 (Mo. 2007) (en banc) ("[J]urisdiction remains in the trial court unless it appears by a preponderance of the evidence that the matter falls within the exclusive jurisdiction of workers' compensation law. . . . [T]he court must examine the facts presented and find by a preponderance of the evidence that the issue contested is one within the [Workers' Compensation Division's] expertise.").

288. *Soars v. Soars-Lovelace, Inc.*, 142 S.W.2d 866, 871 (Mo. 1940).

289. Wasserman, *supra* note 174, at 1548.

290. *Spencer v. Zobrist*, 323 S.W.3d 391, 399 (Mo. App. W.D. 2010).

291. Wasserman, *supra* note 174, at 1548.

292. MO. REV. STAT. § 287.120 (Supp. 2012).

the burden to present facts that establish the elements.²⁹³ Because these elements govern who can make a claim and for what, their underlying factual issues are matters of substantive merit.²⁹⁴ Because section 287.120.1 sets out factual issues of substantive merits, only the Division of Workers' Compensation can determine these facts, including whether an injury resulted from an on-the-job accident.

Contrast these provisions with the provisions in section 287.120.2. This statute declares that workers' compensation is the exclusive remedy for an employee making a claim that satisfies the elements set out in section 287.120.1.²⁹⁵ By invoking the exclusive remedy, section 287.120.2 sets out a jurisdictional rule. *J.C.W.* warned of being misled by statutes that spoke "in jurisdictional terms or [could] be read in such terms . . .," but it was referring to statutes that set "statutory limits on remedies or elements of claims for relief that courts may grant."²⁹⁶ The workers' compensation statutes are truly jurisdictional. They mandate that workers' compensation "rights and remedies . . . shall exclude all other rights and remedies . . ."²⁹⁷ This provision, especially coupled with another subsection of section 287.120, which releases an employer "from all other liability whatsoever,"²⁹⁸ is clearly jurisdictional. These statutory restrictions are not like the bond requirement at issue in *J.C.W.* Rather, these provisions abolish all causes of action except for workers' compensation as adjudicated by the division.

Thus, the *McCracken* court correctly declared that the circuit court was the proper entity to decide whether the plaintiff was the defendant's statutory employee, but it was not for the reason asserted by *McCracken*. The *McCracken* court concluded that the circuit court should decide the issue because it was "not a jurisdictional one . . ."²⁹⁹ In actuality, the circuit court should have decided the jurisdictional facts (whether the plaintiff was the defendant's statutory employee) because the issue *was* jurisdictional. If the plaintiff was not the defendant's statutory employee, the division would not have authority to adjudicate the matter as a workers' compensation claim.

293. *Russell v. Sw. Grease & Oil Co.*, 509 S.W.2d 776, 778 (Mo. App. K.C.D. 1974) *overruled on other grounds by* *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003) (en banc).

294. Wasserman, *supra* note 174, at 1548.

295. § 287.120.2 ("The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee, his wife, her husband, parents, personal representatives, dependents, heirs or next kin, at common law or otherwise, on account of such injury or death, except such rights and remedies as are not provided for by this chapter.").

296. *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 255 (Mo. 2009) (en banc).

297. § 287.120.2.

298. § 287.120.1.

299. *McCracken v. Wal-Mart Stores E., L.P.*, 298 S.W.3d 473, 475 (Mo. 2009) (en banc).

Because the issue was to be determined by the jurisdictional facts, the circuit court, not the division, was the proper entity to decide the matter as a question of law.

Because *J.C.W.* and *McCracken* did not make such distinctions between jurisdictional and non-jurisdictional facts and explain their significance, Missouri courts have failed to understand how to apply these important, fundamental concepts when analyzing jurisdictional issues. For example, in *Cook* the court endeavored to apply *McCracken*'s analysis to determine who had jurisdiction – the circuit court or the Division of Workers' Compensation – in a case in which the plaintiff complained of “an occupational disease” rather than an “accident.”³⁰⁰ The plaintiff sued his former employer for negligence for allegedly exposing him to asbestos, which caused him to develop mesothelioma.³⁰¹ The employer argued for summary judgment on the grounds that the plaintiff's claims constituted a workers' compensation claim.³⁰²

Rather than distinguishing jurisdictional facts from non-jurisdictional facts, the *Cook* court interpreted the workers' compensation statutes to decide whether the plaintiff's claim fit within their scope.³⁰³ In a 9-2 split, the majority ruled that because occupational diseases are outside the scope of workers' compensation statutes, which provide a remedy only for on-the-job accidents, the circuit court had jurisdiction to adjudicate the matter.³⁰⁴

The *Cook* court incorrectly treated the factual issue – whether an occupational disease constitutes an accidental injury – as jurisdictional. This issue is not jurisdictional because it pertains to the substantive merits of the case. Hence, the facts giving rise to the issue are non-jurisdictional facts to be determined by the division.³⁰⁵ By allowing the circuit court to involve itself in the matter, the *Cook* court usurped the division's authority. More importantly, the intrusion created the opportunity for the circuit court to contradict the division's prior decisions concerning what constituted an accident, thereby creating conflicting lines of cases and interfering with the division's ability to set policy.³⁰⁶

Unlike the *Cook* court, the circuit court in *McCracken* correctly perceived the nature of the factual question it considered – whether the plaintiff

300. State *ex rel.* KCP & L Greater Mo. Operations Co. v. Cook, 353 S.W.3d 14, 16 (Mo. App. W.D. 2011).

301. *Id.*

302. *Id.*

303. *Id.* at 18.

304. *Id.* at 19-20.

305. That the *Cook* majority would make the very error decried in *McCracken* – mischaracterizing rules of substantive merits as jurisdictional rules – is ironic in light of the majority's painstaking and laborious attempt to follow *J.C.W.*'s and *McCracken*'s analysis.

306. *Cook*, 353 S.W.3d at 51 (Smart, J., dissenting).

was the defendant's statutory employee – to be jurisdictional.³⁰⁷ After deciding that the plaintiff was, in fact, the defendant's statutory employee, the circuit court correctly understood that the matter was within the division's exclusive jurisdiction.³⁰⁸ Because the workers' compensation statutes abolish all causes of action for on-the-job injuries, the circuit court arguably lacked subject matter jurisdiction.³⁰⁹ Dismissal was its only option. On the other hand, if the circuit court had reached the decision that the *McCracken* court did – that the plaintiff was not the defendant's statutory employee – the circuit court would have properly retained jurisdiction. The Supreme Court's determination that the plaintiff was not the defendant's statutory employee made the matter a valid, cognizable negligence action not supplanted by workers' compensation law.³¹⁰

Such an analytical approach protects the circuit courts' plenary subject matter jurisdiction while avoiding the jeopardy that *McCracken* posed to administrative adjudication. By distinguishing between jurisdictional and non-jurisdictional facts, the circuit court has a sound basis for dismissing invalid tort actions over which it has no subject matter jurisdiction, such as workers' compensation matters, enabling the appropriate entity to exercise its jurisdiction.³¹¹ Moreover, the circuit court has the authority to dismiss the matter *sua sponte*.³¹²

B. Alternative Two: Interpret Section 14(c) as Not Including Administrative Adjudications

Another alternative to the all-or-nothing approach of *McCracken* is to understand that the terms “cases” and “matters” used in Article V, section 14(a) of the Missouri Constitution do not necessarily refer to administrative adjudications. Missouri case law considering the nature of administrative adjudication is not abundant, but the few cases that address the issue conclude that administrative cases do not constitute traditional civil actions. Arguably, therefore, they do not fit within the terms “cases” or “matters” as used by section 14(a).

In *Bridges v. State Board of Registration for the Healing Arts*, the court held that administrative adjudications are not traditional civil cases.³¹³ *Bridges* concerned an administrative action against a physician whose license to practice medicine was revoked by a state administrative board on the ground

307. *McCracken v. Wal-Mart Stores E., L.P.*, 298 S.W.3d 473, 474-75 (Mo. 2009) (en banc).

308. The *McCracken* court reversed this decision. *Id.* at 479.

309. *See supra* Part IV.D.2.

310. *McCracken*, 298 S.W.3d at 481.

311. *Green v. St. Louis Cnty.*, 327 S.W.2d 291, 296 (Mo. 1959).

312. *Cook v. Cook*, 97 S.W.3d 482, 485 (Mo. App. W.D. 2002).

313. 419 S.W.2d 278, 281 (Mo. App. 1967).

that he performed illegal abortions.³¹⁴ At issue was the physician's assertion that the board wrongfully denied his request for a continuance of a hearing to consider revocation of his license.³¹⁵ He made the request pursuant to a statute, which required continuance of a civil case if the attorney involved in the case was a legislator who was attending a legislative session when the civil case was scheduled.³¹⁶ The *Bridges* court rejected his contention, partly because the statute applied only to civil or criminal cases, and the board's hearing, as an administrative proceeding, was neither.³¹⁷

In reaching this conclusion, the *Bridges* court relied on the Supreme Court of Missouri's decision in *State v. Harold*.³¹⁸ In that case, the court declared a juvenile proceeding was neither a criminal nor a civil matter.³¹⁹ The court reasoned that it could not be a civil case – described as “a private right or the redress or prevention of a private wrong” – because juvenile proceedings are “administrative police regulations.”³²⁰ The court explained:

The State is not a party to the proceedings in the sense that parties seek the protection of private rights or prevention of private wrongs in civil cases. Juvenile cases may partake something of the nature of civil cases and also of criminal cases. However, under the basic distinctions between civil and criminal cases recognized in this state for many years, we conclude that the instant proceeding does not classify as a “civil case” within the meaning of the term as used in the *constitutional appellate jurisdictional sense*.³²¹

The *Bridges* court also relied on *State ex rel. Ball v. State Board of Health*, in which the Supreme Court of Missouri considered another physician licensing matter.³²² The State Board of Health revoked a physician's license to practice medicine and surgery for “unlawfully solicit[ing] patrons

314. *Id.* at 280.

315. *Id.* at 281.

316. *Id.* The statute said:

In all *civil cases* or in criminal cases pending in any court of this state at any time when the general assembly is in session, it shall be a sufficient cause for a continuance if it shall appear to the court, by affidavit, that . . . any attorney . . . of such party is a member of either house of the general assembly, and in actual attendance on the session of the same, and that the attendance of such . . . attorney . . . is necessary to a fair and proper trial or other proceeding in such suit . . .

MO. REV. STAT. § 510.120 (1959) (emphasis added).

317. *Bridges*, 419 S.W.2d at 281.

318. 271 S.W.2d 527 (Mo. 1954).

319. *Id.* at 529.

320. *Id.* at 530.

321. *Id.* (emphasis added).

322. 26 S.W.2d 773 (Mo. 1930).

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by agents.”³²³ In response to the defrocked physician’s complaints that the board had not followed adequate civil procedures, the court observed that the proceeding before the board was not a lawsuit; therefore, the board was not obligated to heed the technical rules of a judicial trial.³²⁴ The court further explained:

The state board of health is not a court It can issue no writ. It can try *no case* – render no judgment. It is merely a governmental agency, exercising ministerial functions. It may investigate and satisfy itself from such sources of information as may be attainable as to the truth or falsity of charges of misconduct against one holding one of its certificates, but its investigation does not take on the character of a judicial trial. To guard and protect the health and welfare of its people the state must have its ministerial agents or officers and [e]ntrust them with power³²⁵

Moreover, the Missouri Constitution deems administrative adjudications sufficiently distinctive that it makes special provision for subject matter jurisdiction for judicial review of the adjudications. The constitution mandates that, when no other provision of law sets the jurisdiction for judicial review, the Supreme Court shall set it by rule. The constitution states:

Unless otherwise provided by law, administrative decisions, findings, rules and orders . . . shall be reviewed in such manner and by such court as the supreme court by rule shall direct and the court so designated shall, in addition to its other jurisdiction, have jurisdiction to hear and determine any such review proceeding.³²⁶

Arguably, this provision would be unnecessary if section 14(a)’s reference to “all cases and matters” included judicial review of administrative adjudication.

Thus, the *McCracken* court had a sound basis for interpreting “cases” and “matters” in section 14(a) as excluding administrative adjudications. Such an interpretation would permit recognition of the exclusivity of workers’ compensation as a jurisdictional issue while still protecting the circuit courts’ plenary subject matter jurisdiction.

³²³ *Id.* at 774.

³²⁴ *Id.* at 777.

³²⁵ *Id.* at 777 (emphasis added) (internal alterations omitted) (quoting *State ex rel. Goodier v. McAnnally*, 93 S.W. 928, 929-30 (Mo. 1906) (en banc)).

³²⁶ MO. CONST. art. V, § 18.

*C. Alternative Three: Deem Workers' Compensation Claims
Masquerading as Tort Actions Non-Justiciable*

Even if the Supreme Court of Missouri rejects the premise underlying the previous two alternatives – that determination of an exclusive administrative remedy is a jurisdictional issue or administrative adjudications do not fit within section 14(a)'s reference to “cases” and “matters” – it has another means for preserving administrative agencies' exclusive jurisdiction without jeopardizing the circuit courts' plenary subject matter jurisdiction. It could employ the doctrine of justiciability. Not all cases over which a circuit court has subject matter jurisdiction are appropriate for judicial action – only claims that are justiciable.

Justiciability is a doctrine, closely related to jurisdiction, which developed as a means for ascertaining when a court's exercise of jurisdiction is appropriate. The principles of justiciability are largely prudential in nature; the judiciary tempers its exercise of power for the benefit of the whole, and for the sake of good government.³²⁷ The Supreme Court of Missouri recognizes that a significant component of justiciability is that a judicial action be “appropriate for judicial determination.”³²⁸ Missouri courts also explain that a question is justiciable only if a case is “ripe” for the judiciary's determination.³²⁹ The Supreme Court held that a trial court should defer to an administrative agency's having jurisdiction in a matter by dismissing the lawsuit pending before the court “until after [the administrative] tribunal has rendered its decision.”³³⁰ These principles give a circuit court means for refusing to consider a matter that it recognizes – *sua sponte* or otherwise – as a cause of action invoking the jurisdiction of an administrative agency. And, as *J.C.W.* put it, the circuit court can do so without “getting all jurisdictional about it.”³³¹

Indeed, in the case of a tort claim arising out of an on-the-job accident, the circuit courts would have prudential, or policy-based, reasons for asserting that the claim is not justiciable. By declaring that workers' compensation cases masquerading as tort actions are non-justiciable, the courts would facili-

327. CHARLES WRIGHT, ARTHUR MILLER & EDWARD COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS, § 3529 (3d ed. 2008); *see* State Tax Comm'n v. Admin. Hearing Comm'n, 641 S.W.2d 69, 73-74 (Mo. 1982) (en banc); Annbar Assoc. v. W Side Redevelopment Corp., 397 S.W.2d 635, 645 (Mo. 1965) (en banc).

328. Cnty. Court of Wash. Cnty. v. Murphy, 658 S.W.2d 14, 16 (Mo. 1983) (en banc); Jacobs v. Leggett, 295 S.W.2d 825, 834 (Mo. 1956) (en banc).

329. Mo. Alliance for Retired Ams. v. Dept. of Labor & Indus. Relations, 277 S.W.3d 670, 678 (Mo. 2009) (en banc) (plurality opinion); Mo. Health Care Ass'n v. Att'y Gen. of Mo., 953 S.W.2d 617, 620 (Mo. 1997) (en banc).

330. Killian v. J & J Installers, Inc., 802 S.W.2d 158, 160 (Mo. 1991) (en banc).

331. *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 251 (Mo. 2009) (en banc).

tate operations of democratic ideals and policies underlying the administrative agencies, notably expertise and specialized knowledge. Equally important, the courts would avoid development of dual, contradictory lines of cases that would instigate forum shopping and undermine agency policy.

The judiciary's robust application of the doctrine of justiciability in tort actions implicating exclusive administrative remedies would go a long way in avoiding the potential pitfalls emerging from *McCracken*. The Supreme Court of Missouri could protect the breadth of the circuit courts' subject matter jurisdiction while preserving operation of administrative adjudication in the manner envisioned by the General Assembly.

D. Alternative Four: Reinstate the Doctrine of Primary Jurisdiction

Perhaps the most viable option is one closely related to the concept of justiciability,³³² which – since *McCracken* – has already been employed by the Missouri Court of Appeals. It is the doctrine of primary jurisdiction, developed by the federal courts more than a century ago as a means for preserving effective operation of federal administrative agencies in cases in which the federal courts and agencies have concurrent jurisdiction.³³³

The Supreme Court of Missouri sets 1932 as the year Missouri adopted a form of the doctrine of primary jurisdiction.³³⁴ As the court describes Missouri's version of the doctrine, it applies to issues involving “administrative expertise, technical factual situations and regulatory systems in which uniformity of administration is essential.”³³⁵ The court instructed trial courts to dismiss actions meeting these criteria in deference to the jurisdiction of administrative agencies.³³⁶ Although Missouri courts applying the doctrine typically emphasize the need for expertise,³³⁷ clearly the need to

332. See WRIGHT, MILLER & COOPER, *supra* note 327, at § 3531.6.

333. *Tex. & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440-41 (1907).

334. *Lamar v. Ford Motor Co.*, 409 S.W.2d 100, 106-07 (Mo. 1966) (en banc) (“The doctrine has been widely applied by the federal courts and has been accepted by the state courts The appellate courts of this state have had occasion to apply the doctrine principally in matters involving the Public Service Commission Act. In *State ex inf. Shartel ex rel. City of Sikeston v. Missouri Utilities Co.*, . . . 53 S.W.2d 394, 401 [(Mo. 1932)] . . . , the court suggested that the question of public necessity for the continuation of electrical service was ‘a matter peculiarly within the jurisdiction of the Public Service Commission,’ and, therefore, was not for consideration in an action to oust utility.”).

335. *Id.* at 107.

336. See *id.*

337. *E.g.*, *Harris v. Westin Mgmt. Co. E.*, 230 S.W.3d 1, 3 (Mo. 2007) (en banc) (“The determination of the existence of an employer/employee relationship is not a question requiring agency expertise.”).

maintain uniformity in the administrative agencies' adjudications is also a significant component.³³⁸

Using the primary jurisdiction doctrine to dismiss tort actions that were in actuality workers' compensation claims became so common that courts dropped reference to primary jurisdiction and spoke only of jurisdiction in general terms.³³⁹ What the *McCracken* court attributed to erroneous and sloppy analysis³⁴⁰ were more likely decisions applying the primary jurisdiction doctrine without so specifying. This appears to be the case in the one decision cited by *McCracken*.³⁴¹

In *Cooper v. Chrysler Group, LLC*, the court employed the doctrine in its review of a lawsuit in which the plaintiff sought recovery for injuries suffered in an apparent on-the-job slip and fall accident.³⁴² The circuit court granted the defendant's motion for summary judgment on the grounds that plaintiff's exclusive remedy was workers' compensation.³⁴³ The *Cooper* court applied the doctrine of primary jurisdiction to reverse the circuit court's judgment and remand with instructions that the trial court stay the plaintiff's lawsuit until the Division of Workers' Compensation determined "whether there was an 'accidental injury' as defined by the Workers' Compensation Law."³⁴⁴ The key to the *Cooper* court's mandate was that the circuit court was directed not to dismiss the action on remand.³⁴⁵ Instead, it was to put the circuit court proceedings on hold until the division had a full opportunity to exercise its adjudicatory authority.³⁴⁶

Three months earlier, two Missouri appellate judges called attention to the doctrine in separate dissenting opinions in *Cook*.³⁴⁷ Weighing in on whether the circuit court or the Division of Workers' Compensation should determine whether a plaintiff's tort claim is within the exclusive purview of the workers' compensation statutes,³⁴⁸ Judge James Welsh argued that, even after *McCracken*, primary jurisdiction still operates when workers' compensation statutes are implicated:

338. *Lamar*, 409 S.W.2d at 107.

339. *E.g.*, *State ex rel. Taylor v. Wallace*, 73 S.W.3d 620, 621, 623 (Mo. 2002) (en banc).

340. *McCracken v. Wal-Mart Stores E., L.P.*, 298 S.W.3d 473, 475, 478 (Mo. 2009) (en banc).

341. *Id.* at 478 (citing *Wallace*, 73 S.W.3d at 621, 623).

342. 361 S.W.3d 60, 61-62 (Mo. App. E.D. 2011).

343. *Id.* at 61.

344. *Id.* at 61-62.

345. *See id.* at 67.

346. *See id.*

347. *State ex rel. KCP&L Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14, 44, 46 (Welsh, J., and Smart, J., dissenting in separate opinions).

348. *Id.* at 16.

The circuit court does not have the option of retaining the case, proceeding to adjudicate [a non-jurisdictional factual issue] and the negligence issue, and then entering judgment accordingly. While both the [division] and the court may have concurrent subject matter jurisdiction of the dispute, only one forum is the proper initial forum under these circumstances. The case must be dismissed so that it can be processed in the [division] because the [division] is the only proper initial forum for the matter in this procedural setting.³⁴⁹

In his dissenting opinion, Judge James Smart offered this description of the doctrine:

The concept . . . is grounded partially in practicality and partially in the concept of separation of powers. It permits a “workable allocation of business” between the courts and the agencies established by the legislature It applies where a claim that could (originally) have been addressed in a court has, under a regulatory scheme, been placed under the special competence of an administrative body.³⁵⁰

Indeed, in Missouri’s post-*McCracken* era, this common law doctrine seems to offer the best prospect for maintaining a peaceful coexistence between the judicial and executive branches of Missouri government. The United States Supreme Court endorsed it as “key” to achieving “consistent and coherent policy” between courts and agencies.³⁵¹ Another federal court suggested that an excellent way to integrate an agency into the judiciary’s decision-making is to give the agency “the first word” on issues within the agency’s jurisdiction.³⁵²

Because the doctrine is, as Judge Smart indicated, grounded in prudential considerations, Missouri courts are free to use it to carve out the best approach for achieving effective adjudication for a litigant. In an approach taken by the *Cooper* court, the courts certainly can stay their proceedings to give an administrative agency whose jurisdiction has been implicated an opportunity to adjudicate issues within the agency’s exclusive purview. The circuit court would retain jurisdiction over the case while it awaits action by the agency. The agency should not feel obligated to address an issue and can decline to act on a matter. As had been the courts’ custom prior to *McCracken*, a court can dismiss the entire lawsuit when it concludes that the matter is within an agency’s jurisdiction. It typically reaches this decision after con-

349. *Id.* at 43-44 (Welsh, J., dissenting).

350. *Id.* at 50 (Smart, J., dissenting) (quoting *Civil Aeronautics Bd. v. Modern Air Transp., Inc.*, 179 F.2d 622, 625 (2d Cir. 1950)).

351. *Port of Boston Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68 (1970).

352. *Miss. Power & Light Co. v. United Gas Pipeline Co.*, 532 F.2d 412, 417 (5th Cir. 1976).

ducting an evidentiary hearing, as the trial court did in *McCracken*, to gather the jurisdictional facts.

E. Getting the Last Say Under Judicial Review

Under primary jurisdiction or the other alternatives to the all-or-nothing analysis of *McCracken*, the courts have assurance that any administrative law matter it turns away will return to the judiciary for review after the agency enters its final decision and the matter is ripe for review.³⁵³ Thus, although the administrative tribunal has the first say, the judiciary has the last say in its review of the agency's decision pursuant to its constitutional authority set out in Article V, section 18.³⁵⁴

Therefore, in the primary jurisdiction doctrine or the other alternatives, the judiciary has available a flexible, effective means to achieve its central goal of protecting its plenary subject matter jurisdiction. At the same time, the judiciary achieves a workable allocation of business between it and the administrative agencies, with an aim of promoting good government.

VI. CONCLUSION

According to the Supreme Court of Missouri's understanding, two factors "bring down to earth and clarify the meaning of . . . 'jurisdiction.'"³⁵⁵ The first factor is that Missouri's constitution grants circuit courts subject matter jurisdiction "over all cases and matters, civil and criminal."³⁵⁶ The second factor is that the General Assembly is powerless under the constitution to diminish this all-encompassing jurisdictional power.³⁵⁷ The Supreme Court understands these factors to mean that no statute can restrict the circuit courts' jurisdictional power and, if the statute claims to restrict the circuit

353. MO. CONST. art. V, § 18.

354. This provision says,

All final decisions, findings, rules and orders on any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record.

MO. CONST. art. V, § 18.

355. J.C.W. *ex rel.* Webb v. Wyciskalla, 275 S.W.3d 249, 251 (Mo. 2009) (en banc).

356. MO. CONST. art. V, § 14(a).

357. J.C.W., 275 S.W.3d at 254-55.

courts' exercise of its power in any way, the statute is necessarily non-jurisdictional and can be enforced, if at all, by the parties.³⁵⁸

In formulating this "simple" approach to jurisdiction,³⁵⁹ the *J.C.W.* court locked its focus on the term "all" in the constitution's grant of jurisdiction over "all cases and matters."³⁶⁰ The court concluded that "all" means that a circuit court has subject matter jurisdiction over every cause of action – even one abolished by the General Assembly – so long as the case purports to be "a civil case."³⁶¹

Pursuant to its inherent legislative authority, the General Assembly abolished common law tort claims for on-the-job accidents and substituted the workers' compensation remedy.³⁶² To be lawful, this legislative prerogative must satisfy the constitution's requirements for separation of powers and its guarantee of a right for every legal wrong.³⁶³ The General Assembly's abolition of such tort actions did not offend the constitution. By substituting workers' compensation for the tort action, the General Assembly provided a means for redressing on-the-job injuries. And, by giving the Division of Workers' Compensation only quasi-judicial and quasi-legislative authority, the legislature did not cause the division to unduly intrude into the circuit courts' domain.³⁶⁴ Hence, the General Assembly did not violate separation of powers in substituting workers' compensation for common law tort claims for on-the-job accidents.

Nonetheless, the Supreme Court of Missouri seemed to perceive in *McCracken* that the recognition of workers' compensation as an exclusive remedy intrudes into the circuit courts' domain. The only way this could be the case is if the language "all cases and matters" includes workers' compensation claims. In other words, a conclusion that the circuit court in *McCracken* had subject matter jurisdiction is proper only if the circuit court had concurrent jurisdiction with the Division of Workers' Compensation. Concluding that circuit courts have concurrent jurisdiction with the division is clearly contrary to separation of powers.

The circuit courts' concurrent jurisdiction means that the General Assembly would be powerless to abolish a cause of action in Missouri. Notwithstanding the General Assembly's abolition of tort claims for on-the-job accidents, the circuit courts still have jurisdiction over these claims by virtue of the courts' jurisdiction over *all* cases, including workers' compensation claims. However, this is a dubious proposition. As the Supreme Court observed previously, "Article V [of the Constitution], the Judicial Article, is

358. *McCracken v. Wal-Mart Stores E., L.P.*, 298 S.W.3d 473, 475 (Mo. 2009) (en banc).

359. *J.C.W.*, 275 S.W.3d at 254.

360. *Id.* at 253-54.

361. *Id.* at 254.

362. MO. REV. STAT. § 287.120 (Supp. 2012).

363. *J.C.W.*, 275 S.W.3d at 255.

364. *Asbury v. Lombardi*, 846 S.W.2d 196, 200 (Mo. 1993) (en banc).

devoted to governing the courts and judges, and we do not read the [1976] amendment [granting the circuit courts plenary jurisdiction] as a constraint upon the previously established power of the administrative agencies.”³⁶⁵

Furthermore, deeming the circuit courts to have concurrent jurisdiction has the effect of centralizing adjudicative power in the judiciary, thereby nullifying the General Assembly’s authority to ever grant jurisdiction exclusively to an administrative agency.³⁶⁶ It renders the General Assembly powerless to create an administrative agency that can operate without the circuit courts’ improper intrusion on agency policy and expertise. As the Supreme Court has long recognized, “[A] careful study of the whole Constitution will . . . demonstrate that it was not the purpose to make a total separation of [legislative, executive, and judicial] powers. . . . Each branch constitutes only a part of a single government and must interact harmoniously with the other two.”³⁶⁷

Under the *McCracken* court’s perception of jurisdiction, harmonious interaction between Missouri’s circuit courts and administrative tribunals is seriously threatened. The court’s insistence that the circuit courts have jurisdiction and can adjudicate claims that are not even causes of action in Missouri (claims arising out of on-the-job accidents) enables the judiciary to run roughshod over the General Assembly’s inherent power to abolish causes of action and to substitute an exclusive administrative remedy.

The Supreme Court of Missouri acted with the understandable aim of protecting the circuit courts’ plenary jurisdiction. What the court seemingly failed to appreciate, however, was that it could achieve this worthy goal without trampling on the authority of the other branches of government. Several sound alternatives outlined in this Article are available to the court and would simultaneously preserve the jurisdiction of the circuit courts and the state’s administrative tribunals. For the sake of sound government and effective operation of the state’s administrative agencies – presumably not mutually exclusive concepts – Missouri’s courts must rethink their analysis of administrative agency jurisdiction.

365. *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6, 12 (Mo. 1992) (en banc).

366. *Killian v. J & J Installers*, 802 S.W.2d 158, 160 (Mo. 1991) (en banc) (citing *Hannah v. Mallinckrodt, Inc.*, 633 S.W.2d 723, 727 (Mo. 1982) (en banc)).

367. *State Tax Comm’n v. Admin. Hearing Comm’n*, 641 S.W.2d 69, 74 (Mo. 1982) (en banc) (quoting *Rhodes v. Bell*, 130 S.W. 465, 468 (Mo. 1910)).